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A TREATISE
ON
THE LAW
OF
AND LORD AND TENANT,
AS ADMINISTERED
IN IRELAND.

BY
JOHN SMITH FURLONG, ESQ.,
ONE OF HER MAJESTY'S COUNSEL.

* L'interprétation par voie de doctrine, consiste à saisir le vrai sens des lois, à les appliquer avec discernement, et à les suppléer dans les cas, qu'elles n'ont pas réglés.—L'interprétation par voie d'autorité, consiste à résoudre les questions et les doutes, par voie de réglemens ou de dispositions générales. Ce mode d'interprétation est le seul qui soit interdit au juge.—*Article du Code Civil Français.*

IN TWO VOLUMES.

VOL. II.



DUBLIN:

HODGES AND SMITH, 104, GRAFTON-STREET.

MDCCLXV.

DUBLIN :
PRINTED AT THE UNIVERSITY PRESS,
BY M. H. GILL.

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THE LAW

OF

LANDLORD AND TENANT.

BOOK THE FIFTH.

REMEDIES INCIDENT TO TENANCY.

CHAPTER I.

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1. ACCORDING to feudal principles, the lands of a vassal or tenant, who did not observe the duties and services required by his tenure(a),

(a) Wright's Tenures, 197 ; Sullivan's Lectures, 107.

were liable to forfeiture, and might be resumed by his feudal superior but during the reign(*b*) of Henry the Second, when the strictness of the military policy had in some measure been relaxed, the lord was authorized only to seize the fee, in nature of a distress(*c*), and to withhold the possession until his demand was satisfied, or the tenant appeared and made his defence. Whilst the services to be rendered for land continued uncertain, or did not admit of pecuniary compensation, great hardships were often endured by the tenant, but the severity of the feudal code was mitigated in this respect by the Statute(*d*) of Marlbridge, which substituted in lieu of seizure of the feud, a right of detaining all the moveable chattels found on the land, for the purpose of compelling the tenant duly to perform his services, and discharge his rent. A distress then came to be considered a mere right of retention in nature of a pledge, until the duties incident to the tenure were performed.

2. A landlord, by making a distress, does not acquire either a general or special property in, or even the possession of the cattle or goods distrained, and though the goods be removed to his own house they are not considered as being in his custody(*e*), but in the custody of the law, and his house as the pound: and if the goods distrained be carried away by a third person, the landlord cannot maintain either trover or trespass for their recovery; and being placed in custody of the law, they cannot be used or worked, and are only liable to be sold by force of the Statutes passed for that purpose(*f*): a distress differs from a pledge, because the pawnee gains a special property(*g*) in the goods pledged, which enables him to bring an action of trespass or trover against a wrong-doer, but the property in goods distrained continues in the tenant until they have been sold.

If the tenant offered gages and pledges for performance of the services and payment of the rent, and the landlord refused to restore the goods, the tenant, by suing out a writ of replevin, was enabled to regain possession of his property, and to put the justice of the seizure into a course of trial: and although a rent were granted with clause of distress, accompanied by an express stipulation, that the

(*b*) About the year 1160.

(*c*) *Districtio est pignoris loco capere quicquid in feudo reperitur donec domino de relevio satisfactum fuerit.* Cowelli. Instit. lib. ii. sect. 17.

(*d*) 52 Hen. III. c. 22, Stat. of Marlbridge.

(*e*) *The King v. Cotton*, Parker's Rep.

112; 2 Vesey, S. 288, S. C.; *Piggo v. Birtles*, Tyrw. & Gr. 729; 1 Mees. W. 441.

(*f*) 18 Edw. IV. c. 1, Irish; 10 & 11 Car. I. c. 7, Irish; 25 Geo. II. c. 1, Irish; 2 Will. & M. Sess. 1, c. 5, English.

(*g*) *Mores v. Conham*, Owen, 123.

grantee should hold the goods distrained against gages and pledges, until the rent should be paid, yet a replevin may be prosecuted(*h*), as it is contrary to the nature of such a distress, that it should be irreplevisable. The chattels seized, as well as the process of distraining, are denominated a distress.

3. By the civil law, a landlord had a tacit *hypothec*, or lien(*i*), for his rent, on the fruits and produce of the farm, but not extending to the tenant's furniture, cattle, or stock; and the proprietor of a dwelling-house, shop, or warehouse, had a similar *hypothec*, or lien, on all the moveables (*inducta vel illata*) brought into them by the tenant, while they remained on the premises.

4. The recovery of rent owing by a tenant, is most frequently the cause of distraining; but any person in possession of land may authorize his creditor(*j*) to enter and distrain in default of payment, and the person giving such license cannot object that he has no estate in the premises. A land-owner has also a right to seize any cattle trespassing on, or any chattels encumbering his ground, and to detain them until satisfaction be made for the injury sustained, or until replevied by due course of law.

Remedies by distress and sale, in nature of an execution, are given by many Acts of Parliament for recovery of duties and penalties, which do not come within the scope of this treatise.

5. Whenever a conveyance in fee, or lease for ever, is made of lands, reserving a rent, and creating a tenure(*k*) between the parties, such reservation is a rent-service, for which a distress lies at the suit of the grantor and his heirs, though no actual reversion be retained.

The right to distrain, being substituted for seizure of the feud, was an inherent privilege belonging to the reversioner, or to such person(*l*), as might formerly have availed himself of a forfeiture of the tenant's estate for a violation of the feudal contract, and hence the right of distress was deemed(*m*) an inseparable incident to fealty. Upon a demise of land either for lives or for years, reserving rent, if a reversion be retained, the lessor may, by the common law, enter and distrain, without any express provision or agreement for that purpose; but if a lessee for lives or years assign his whole estate(*n*), reserving rent, he cannot enforce its payment by distress, at common law, unless

(*h*) Co. Litt. 145, B.

(*i*) Digest. lib. 20, tit. 2; and see Bell on Scotch Leases, 362-384.

(*j*) Chapman v. Beecham, 3 Gale & Dav. 71.

(*k*) See *ante*, Book 2, page 346.

(*l*) Gilb. Distr. by Hunt, 3.

(*m*) Co. Litt. 151, B. 143, A.

(*n*) Gilb. Distr. by Hunt, 29; Bac. Abr. Distress, A.

a special authority for that purpose be contained in the instrument of transfer.

A reversioner, however, cannot distrain for rent reserved out of tithes(*o*), or any other incorporeal inheritance, as such a procedure would be inconsistent with the nature of the property charged.

6. Where a rent is granted by deed to be issuing out of, or is charged upon specified lands, with an express clause of distress, and unaccompanied with any reversion or future interest in the soil, the grantee is entitled to distrain for such a rent-charge(*p*) by virtue of the clause for that purpose; and if the deed omitted giving any such authority, the rent was called a "rent-seck," and the grantee had no remedy by distress, at common law, for its recovery. An annuity is a yearly sum granted by deed, without mentioning any land out of which it shall issue, and is only chargeable on the person of the grantor.

A right to distrain may be given against an estate, without creating any rent-charge out of that estate; for if a rent be granted issuing out of the manor of Bewley, with power to distrain(*q*) in the manor of Sale, both manors are charged, one with the rent, and the other with a distress for the rent. The grantee of a rent-charge, however, cannot lawfully distrain the cattle, or goods of a person in possession of premises under a subsisting demise(*r*) made previously to the creation of the rent-charge, because the lessee holds by title paramount to the charge.

7. By the Irish Statute(*s*) 11 Anne, c. 2, a like remedy as in cases of rent-charge is given for recovery of rents-seck and chief-rents, which had been duly paid for three years within the space of twenty years before the first day of the then session of parliament, or which should be thereafter created.

8. In order to entitle a party to the benefit of this Act, the reservation or grant of rent must be such as would, at common law(*t*), have amounted to a rent-seck, and hence, it follows, that all rents issuing out of freehold estates, though no power to distrain be given, or rever-

(*o*) Co. Litt. 142, A.; Jewel's case, 5 Rep. 3, A.

(*p*) 1 Bythew. Conv. 580; Brediman's case, 6 Rep. 57.

(*q*) Butt's case, 7 Rep. 23, B.; Co. Litt. 147, A.; Locke v. Darley, 2 Dru. & Warr. 266; Chapman v. Beecham, 3 Gale & D. 71.

(*r*) Saffery v. Elgood, 1 Ad. & Ell. 191, 3 Nev. & M. 349; Johnson v. Faulkner, 2 Q. B. Rep. 925; 2 Gale &

Dav. 184; 1 Ro. Abr. 669; Distress I. pl. 26; Com. Dig. Distress, B. 2.

(*s*) 11 Anne, c. 2, s. 7, Irish. The English Statute, 4 Geo. II. c. 28, s. 5, instead of giving the like remedy as in cases of rent-charge, substitutes the words, "as in cases of rent reserved upon leases."

(*t*) 4 Jarman's Conv. by Sweet. 346; Bradby by Adams, 68.

sion be retained, may be enforced by distress : so if a tenant for years assign his interest reserving rent, or grant a rent issuing out of the premises, with power to distrain, such reservation or grant constitutes a rent-charge, for the recovery of which a distress(*u*) may be maintained; but if such transfer or grant do not contain any clause(*v*) of distress, the reservation or encumbrance is only an annuity(*w*), in nature of a rent, and not a rent-seck, and cannot be enforced(*x*) by distress : the only remedy(*y*) for such a rent being an action on the contract. A lessee for years having assigned his term, the lease afterwards came back to the original lessor, under an agreement with the assignee, that he, the lessor, should hold the premises, paying a specified sum annually above the reserved rent, and it was ruled, the agreement operated as a surrender(*z*) of the whole term, and that the annual payment stipulated for by the agreement was not a rent for which distress would lie.

An inheritor, who had demised lands for sixty-one years, reserving rent, afterwards made a lease of the same lands to another for years, commencing on the expiration of the original lease, and it was decided that the lessor had a right to distrain(*a*) for the rent reserved by the original lease, notwithstanding the grant of the reversionary term, because the second lease being made to take effect *in futuro*, only conferred an “*interesse termini*,” and did not pass any estate until the determination of the original lease.

9. If a person seised of land in fee simple, and possessed of other land for years, grant a rent-charge for life issuing out of both, with clause of distress in both, the chattel interest as well as the inheritance(*b*) is subject to the distress, but the rent being freehold, can only issue out of fee, and not out of the term, and though the grantee may

(*u*) Lamb. *v.* West, Hutt. 114; Gough *v.* Howard, 3 Bulstr. 121; 1 Ro. Rep. 368; Butt's case, 7. Rep. 23, A.

(*v*) Year Book, 45 Edw. III. fo. 8, pl. 10, by Finchden; Bro. Abr. Dett. pl. 39; Distresse, pl. 7; Cooper's case, 2 Wils. 375; Parmenter *v.* Webber, 8 Taunt. 593; 2 Moo. 656; Poultney *v.* Holmes, 1 Stra. 405; Whitton *v.* Bye, Cro. Jac. 487; Spatchurst *v.* Minns, Al. 57; Preece *v.* Corrie, 5 Bing. 24; 2 Moo. & P. 57; Pascoe *v.* Pascoe, 3 Bing. N. C. 898; 5 Scott, 117; 1 Selw. N. P. 671.

(*w*) Baker *v.* Gosling, 1 Bing. N. C. 19; 4 Moo. & Sc. 539.

(*x*) Si je soy seisie de certain terre, et

jeo la lesse a un home a terme d'ans rendant a moy quarante livres per an de chescun terme, j'avera briefe de det, et auxy jeo puisse distrainer : mais si jeo n'ay que un terme des ans, et jeo vous lesse tout mon estate del terme, rendant a moy certain rent, jeo croy, que jeo ne puis distrainer, si le rent soit aderere. Y. B. 45 Edw. III. fo. 8, pl. 10, par. Finchden. Ch. Just.

(*y*) Newcomb *v.* Harvey, Carth. 161.

(*z*) Smith *v.* Mapleback, 1 T. R. 441.

(*a*) Smith *v.* Day, 1 Mees. & W. 685.

(*b*) Butt's case, 7 Rep. 23; Co. Litt. 147, B.; Collins *v.* Harding, Cro. Eliz. 606-622; see *ante*, 349.

distrain upon the leasehold, he must avow for the rent as derived solely out of the fee. If a house and land, with a stock of cattle, be demised for years rendering rent, and the lessee covenant to yield up the cattle at the end of the term, though the reserved rent(c) is increased in respect of the stock, yet it issues out of the land only, and not out of the personal chattels, and if in arrear, may be levied by distress and upon this principle it was decided, that if apartments be let furnished(d), a distress may be made for the whole rent reserved, as, in contemplation of law, it issues exclusively out of the realty.

10. A tenant from year to year, or from month to month(e), who demises to another from year to year, at a yearly rent, has a reversion which enables him to distrain for the reserved rent; and, in like manner, a yearly tenant who redemised part of the premises to his lessor(f) from year to year, was considered entitled to a reversion sufficient to support a distress.

It is matter of presumption, that the landlord has the freehold in demised premises, unless it be shewn that his title has determined: plea justifying an alleged trespass in distraining for rent as landlord under a demise(g), without showing any reversion, was held to be sufficient, as the landlord *primâ facie* had a right to distrain, and the other party was bound to show there was no such right; but upon an avowry of common law, a reversion will not be presumed to exist in the avowant(h).

11. If a lease be made for a term of years, and the lessor afterward make improvements on the demised premises, in consideration of the tenant's undertaking to pay an additional(i) yearly rent, a distress cannot be maintained for recovery of such yearly sum.

12. The right to distrain is appurtenant to the estate in the rent, and in the reversion of lands, and if the privity of estate be destroyed, the remedy by distress will be lost; and, therefore, if a person be seised in fee, or for life, of a rent-charge(j), and after arrears have incurred do grant over the rent to another, no distress can be maintained either by

(c) *Spencer's case*, 5 Rep. 16, A.; *Emott v. Cole*, Cro. Eliz. 255.

(d) *Newman v. Anderton*, 2 New Rep. 244; *Farewell v. Dickenson*, 6 B. & Cress. 251; 9 D. & Ry. 245, S. C.

(e) *Peirse v. Sharr*, 2 Man. & Ry. 418; *Pyke v. Eyre*, 9 B. & Cress. 909; 4 M. & Ry. 661; *Blunden v. Baugh*, Cro. Car. 305; *Mackay v. Mackreth*, 4 Doug. 213; 2 Chitty Rep. 461, S. C.

(f) *Curtis v. Wheeler*, Moo. & M. 493.

(g) *Hooker v. Nye*, 4 Tyrw. 777; Cro. M. & Rosc. 248; *Green v. James*, Mees & W. 656.

(h) *Ryan v. M'Auley*, 1 Jebb & Syme 324.

(i) *Hoby v. Roebuck*, 7 Taunt. 15; 2 Marsh. 433; *Donellan v. Read*, 3 B. & Adol. 905.

(j) *Ognel's case*, 4 Rep. 50, F. *Dixon v. Harrison*, Vaughan, 40; C. Litt. 162, B.

the grantor, or by the grantee(*k*), for such arrears : and upon the same principle, if a landlord, after arrears of rent have accrued, grant away his reversion, he cannot distrain(*l*) for such arrears, because by his own act all privity of estate between him and his tenant is destroyed.

13. In order to sustain a distress by a landlord, there must be a demise(*m*), or a contract for a demise(*n*), at a specified rent ; or a yearly holding must be created by payment of rent, or be implied from circumstances(*o*) affording evidence of such a tenancy ; but the mere entry of a tenant upon premises, in expectation of a lease, is not sufficient for that purpose. A landlord cannot distrain upon a *quantum valebat*(*p*), nor where possession has been obtained under an instrument which does not fix the rent(*q*), unless a holding can be inferred from a periodical payment of rent, or other circumstances ; however, if a tenant pay, or promise to pay(*r*), an ascertained rent, or allow the amount in account with his landlord(*s*), an agreement may be presumed which will warrant a distress. It is not requisite that the rent should be reducible into money, as a tenant may hold of his lord on the terms of shearing all the sheep(*t*) depasturing in the lord's manor, and a distress lies for non-performance of this service, because the number of sheep can always be ascertained by reference to the manor.

14. A landlord was not authorized, by the common law, to distrain for rent under an executory agreement for a lease, but by the Irish Statute(*u*), 25 Geo. II. c. 13, after reciting that several lands, tenements, and hereditaments in Ireland, are enjoyed under articles, minutes, or contracts in writing, whereby the rent payable for the same is ascertained, but do not contain an actual demise, and that avowries, or conusance upon distresses for rent cannot be made, as the law then stood, upon such articles, minutes, or contracts, notwithstanding there hath been an ejectment(*v*) (enjoyment) under the same, and the rent

(*k*) *Gwilliams v. Munnington*, Thos. Raym. 200 ; 1 Ventr. 108 ; *Flight v. Bentley*, 7 Simons, 149.

(*l*) 1 Ro. Abr. Distres, O. plac. 11 ; *Ognell's case*, 4 Rep. 50, B.

(*m*) *Hegan v. Johnson*, 2 Taunt. 148 ; *Dunk v. Hunter*, 5 B. & Ald. 322 ; *Hamerton v. Stead*, 3 B. & Cress. 478-482 ; 5 D. & Ry. 206, S. C.

(*n*) 25 Geo. II. c. 13, s. 4, Irish.

(*o*) *Knight v. Benett*, 3 Bing. 361 ; 11 Moore, 227 ; *Lessee Smith v. Byrne, Batty*, 464-469.

(*p*) *Hamerton v. Stead*, 3 B. & Cress. 482.

(*q*) *Knight v. Benett*, 3 Bing. 361 ; 11 Moore, 227.

(*r*) *Mann v. Lovejoy, Ryan & Moo.* 355 ; *Doe dem. Westmoreland v. Smith*, 1 Mann. & Ry. 137 ; *Regnart v. Porter*, 7 Bing. 453 ; 5 Moo. & P. 370.

(*s*) *Cox v. Bent*, 5 Bing. 185 ; 2 Moo. & P. 281, S. C.

(*t*) Co. Litt. 96, A. ; 142, A. ; *Robert v. William*, Year Book, 7 Edw. III. fo. 38.

(*u*) 25 Geo. II. c. 13, ss. 2 and 4, Ir.

(*v*) *Bushe, C. J.*, said he had compared the parliament roll with the printed copy of the Statute, and found it an ac-

ascertained by such articles, minutes, or contracts, *it is enacted*, that it shall be lawful for all defendants in replevin to avow, or make conscience generally, that the plaintiff in replevin, or other tenant of the lands, tenements, or hereditaments whereon such distress was made, enjoyed the same under a grant or demise, or article, minute, or contract in writing(*w*), at such a certain rent, during the time wherein the rent so distrained for incurred; and that it shall be no objection to any such article, minute, or contract, that the same doth not contain an actual demise.

If a tenant of lands in Ireland enter into possession under an executory agreement in writing for a lease, or under an accepted proposal, at a fixed rent, the landlord may distrain for any rent which becomes due in pursuance of the contract, though no rent has been paid under it: distress may also be made(*x*) for rent reserved payable in advance, and it is not requisite, that the rent should have been incurred for past enjoyment of the premises.

15. A tenant having entered under an agreement containing stipulations for a lease, at a fixed rent, with an engagement(*y*) by the landlord to complete the house, and make it fit for habitation: the premises were not completed, and no rent was paid, but after an occupation of some years, when the tenant was called on for rent, he expressed his readiness to pay what was due, provided the house were finished according to the contract: the Court ruled, that as the agreement itself did not constitute a tenancy, and there was no proof of an absolute and unconditional promise to pay a rent certain, the landlord had no right to distrain. So a person entered into possession of a dwelling-house at fixed rent, upon an undertaking(*z*) by the landlord that it should be suitably furnished, and it was ruled that the furnishing of the house was a condition precedent, and that, in the mean-time, the landlord was not entitled to distrain. Where a lease purports to demise two distinct subjects, and rent is reserved(*a*) payable out of the entire premises, if only one of the subjects passes under the demise, the lessor cannot distrain, as he shall not be allowed to apportion the rent for himself.

16. By the common law, neither the heirs, nor personal(*b*) repre-

curate copy of the original; but he had no doubt the legislature intended to have used the word "enjoyment," and not "ejectment," *Charters v. Sherrock*, Alc. & Nap. 19.

(*w*) The corresponding English Statute, 11 Geo. II. c. 19, s. 22, does not extend to equitable contracts.

(*x*) *Charters v. Sherrock*, Alc. & Nap.

17.

(*y*) *Regnart v. Porter*, 7 Bing. 451; 5 Moo. & P. 370.

(*z*) *Mechelen v. Wallace*, 6 Nev. & M. 316; 7 Ad. & Ell. 54, note; see *Pistor v. Cater*, 9 Mees. & W. 315.

(*a*) *Neale v. Mackenzie*, 1 Mees. & W. 747-750, by Ld. Denman.

(*b*) Co. Litt. 162, A.

sentatives of a person seised in fee-simple, fee-tail, or for life, of a rent-service, rent-charge, or rent-seck, had any remedy by distress for recovery of the arrears incurred during the life-time of the owner of such rents; but by the Irish Statute(c), 10 Car. I. Sess. 2, c. 5, *after reciting* that the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of lives(d) of rent-services, rent-charges, rents-seck, and fee-farms, have no remedy to recover such arrearages of the rents, or fee-farms, as were due unto their testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may *distrain*, or have any lawful action to levy any such arrearages of rent, or of the fee-farms due unto him in his life, by reason of which the tenants of the *demesne* of such lands, tenements, or hereditaments, out of which such rents were due and payable, who of right ought to pay the rents and farms, at such days and terms as they were due, do many times keep and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee-farms were due, cannot have, or come by the said arrearages, towards the payment of the debts, and performance of the will of the testator: *for remedy whereof, it is enacted*, that the executors or administrators of every such person, unto whom any such rent or fee-farm shall be due, and not paid at the time of his death, shall have an action of debt for all such arrearages against the tenant or tenants, who ought to have paid the rent or fee-farm so being behind in the life of their testator, or against the executors or administrators of such tenants: and also, that it shall be lawful for every such executor and administrator of any such person, unto whom such rent or fee-farm shall be due, and not paid at the time of his death, *to distrain* for the arrearages of all such rents and fee-farms, upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents and fee-farms, and chargeable to the distress of the testator, so long as such lands, tenements, or hereditaments continue and be in the seisin or possession of the tenant in *demesne*, who ought immediately to have paid such rent or fee-farm, so being behind to the testator in his life, or in the seisin or possession of any other person claiming the said lands, tenements, and hereditaments, only by and from the same tenant, by purchase, gift, or descent, in like manner and form as their testator might have done in his life-time; and the said executors and administrators shall for the same distress lawfully make

(c) 10 Car. I. Sess. 2, c. 5, Irish; 32 Hen. VIII. c. 37, Eng.

(d) In the English Statute, "Tenants for term of life."

avowry *upon their matter* aforesaid : and if any husband having in of his wife any estate in fee-simple, fee-tail, or for term of life, or in any rents or fee-farms which shall be due in his wife's life, *then* such husband, after his wife's death, his executors and administrators, shall have an action of debt for such arrears, against his tenant *in the demesne*, who ought to have paid the same, his executors and administrators : and also that such husband, after his wife's death, may distrain for such arrears in like manner as he might have done if she had been then living, and make avowry *upon his matter* as aforesaid.

The third section enables tenants *pur auter vie*, their executors and administrators, to have an action of debt for arrears of rent, due at the decease of the *cestuique vie*, against the tenant *in demesne*, who should have paid the same : and also to distrain for such arrears upon the lands and tenements out of which such rents were payable, in such manner as they might have done if such *cestuique vie* were living.

17. The personal representatives of lessee for a term of years, who underlet the land, reserving rent, were entitled, at common law, to distrain for arrears which accrued in the life-time of the deceased tenant, because the arrears of rent were annexed to the reversion, which being then vested in the personal representatives, and is wholly different from the reversion of a freehold estate, which descends to the heir, while the arrears of rent devolve on the executors or administrators.

This Statute being a remedial law, is construed liberally, and extends to the personal representatives of all tenants for life, and gives them a double remedy, either by action of debt, or by distress. An action of debt, however, only lies against the tenant who ought to have paid the rent, or against his personal representatives, but the executors may be distrained for any arrears of rent while they continue in possession of the tenant who suffered such rent to accrue due, or of any person deriving from, or under him, by purchase, gift, or descent. A distress cannot be supported against a person holding the land not charged by title paramount to the estate of the grantor of the lease, as for instance, the lord by escheat, or tenant in dower. So if a tenant *pur auter vie* make an underlease for years, reserving rent, and the landlord, as chief-landlord, upon the decease of *cestuique vie*, enter and demur

(e) 1 Ro. Abr. 672, Distres, O. pl. 13 ; Wade v. Marsh, Latch. 211.

(f) Hool v. Bell, 1 Ld. Raym. 172 ; 2 Lutw. 1230 ; 18 Vin. Abr. 542, S. b. ; Hargr. note 298 to Co. Litt. 162, B.

(g) Ognel's case, 4 Rep. 50, A., third resolution ; Braithwaite v. Cooksey, 1

H. Bla. 465 ; Miles v. Willoughby, Eliz. 547.

(h) Co. Litt. 162, B. ; Ld. Fairford, 2 Vern. 612, and the Anon. 1 Leon. 302, case 418.

(i) Lambert v. Austin, Cro. Jac. 332 ; Owen, 117.

the undertenant; an arrear of rent which was due by the undertenant to his immediate lessor, when the intermediate lease determined by the death of the *cestuique vie*, cannot be enforced by distress, though the undertenant continues in possession, because he derives by title paramount. If a person possessed of lands for a term of years in right of his wife, grant a rent-charge, and then die, leaving his wife surviving, the lands(*j*) cannot be distrained for the rent, as the wife does not derive from her husband; but if he had aliened(*k*) the term, or survived his wife, the rent-charge would have been binding.

If a *feme sole* seised of a rent in fee(*l*), marry whilst the rent is in arrear, and afterwards die, leaving further arrears due, her husband, by the common law, could not have recovered the arrears due before the marriage, but might have recovered by action of debt, the arrears which accrued during the marriage: the second section of the Statute, however, gives him the arrears which were due prior to the marriage, and he may either distrain or bring debt, as well for the arrears due at the time of his marriage, as for those which became due during the coverture, the Statute giving him further remedy for that which the common law gave him.

If a person seised in fee make a lease for life, with remainder for life, remainder in fee, reserving rent, and the tenant for life does not pay the rent, and both lord and tenant for life afterwards die(*m*), the executors of the lord cannot distrain for the arrears upon him in remainder, because the remainder-man does not claim by or from the tenant for life: but if a person seised in fee grant a rent-charge to J. S. *pur auter vie*, and let the lands to one for life, with remainder over, and the tenant for life suffer the rent to run in arrear, and both *cestuique vie* and tenant for life die, J. S. may distrain the remainder-man(*n*) for all the arrears, by force of the third section of the preceding Statute.

The Statute is confined to the personal representatives of such persons as were seised in fee, in tail, or for life, and where J. S. was tenant for life of a rent-charge, of which a moiety was extended under an *elegit*, it was ruled(*o*), that after the decease of the tenant for life, a distress could not be sustained by the *elegit* creditor, for arrears of the rent which became due in his debtor's life-time, because the tenant by

(*j*) Co. Litt. 184, B.

(*k*) Hargr. note 66 to Co. Litt. 184, B., and Butler's note 304 to Co. Litt. 351, A.

(*l*) Co. Litt. 162, B.; Sharp v. Pool, Benloe, 263, pl. 273; 1 Anders. 47, pl. 120; Ognel's case, 4 Rep. 51.

(*m*) Co. Litt. 162, B.; Lambert v. Austin, Cro. Eliz. 332; Owen, 117.

(*n*) Co. Litt. 162, B.; Edrich's case, 5 Rep. 118, A.

(*o*) Pool v. Neel, 2 Sid. 28-62; Pool v. Duncomb, Bull. N. P. 56.

elegit is not named in the Statute, and he comes in by act of law, and not under the tenant for life.

Arrears of rent of every description issuing out of freehold lands, are within the operation of the Act, whether reserved in money(*p*), corn, cattle, or any other profit to be delivered or yielded, but does not include any corporal services, such as work-days, nor the arrears of a *nomine pœnæ*.

18. It was formerly a subject of much doubt, whether upon a lease for *years* reserving rent made by a person seised in fee, the executors or administrators of the lessor were entitled, by force of the Statute of Reversions(*q*), to distrain for arrears of rent incurred in the life-time of the testator or intestate, as such lessor was not within the words of the Statute(*r*) “tenant in fee simple, fee tail, or for term of lives,” of the rent, which was only reserved to him for years. In an action of trespass it appeared that the defendant, as executor, had distrained for rent due to his testator upon a lease for years(*s*), and Lord Chief Justice Lee held the reservation to be a rent-service, and to come within the meaning of the Statute. The same question was again brought under the consideration of the King’s Bench of England, and it was decided(*t*) that the executor of a person, who, being seised in fee, demised for years, reserving rent, could not distrain for arrears of the rent which accrued in his testator’s life-time, for though the reservation was a rent-service, the lessor was not tenant of the rent as the Statute required. But by the Irish Statute(*u*) 3 & 4 Vict. c. 105, it is enacted, that it shall be lawful for the executors or administrators of any lessor or landlord, to distrain upon the lands demised for any term, or at will, for the arrears of rent due to such landlord in his life-time, in like manner as such landlord might have done in his life-time: and that such arrears may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due, and that all and every the powers and

(*p*) Co. Litt. 162, B.

(*q*) 10 Car. I. Sess. 2, c. 5, Irish; 32 Hen. VIII. c. 37, English.

(*r*) Renvin v. Watkin, 1 Selw. N. P. 678; 2 Williams on Executors, 669; Bull. N. P. 57.

(*s*) Powell v. Killick, Bull. N. P. 57; 1 Selw. N. P. 678, note; Staniford v.

Sinclair, 2 Bing. 197; 9 Moore, 376; Martin v. Burton, 1 Brod. & B. 279; 3 Moore, 602; Meriton v. Gilbee, 8 Taunt. 159; 2 Moore, 48.

(*t*) Prescott v. Boucher, 3 B. & Adol. 849; Jones v. Jones, 3 B. & Adol. 967.

(*u*) 3 & 4 Vict. c. 105, ss. 61, 62, Ir.; 3 & 4 Will. IV. c. 42, ss. 37, 38, Eng.

provisions in the several Statutes made relating to distresses for rent shall be applicable to the distresses so made.

The preceding Statute does not embrace a rent-charge issuing out of a term of years, or any rent-charge granted for years, being only applicable to rents reserved on leases; and such rent-charges are not comprehended in the Statute of Reversions, which only extends to those who had rents for lives(*v*), or of inheritance.

A landlord who directed a broker to distrain for rent(*w*), died before the distress was commenced, and his executrix having afterwards recognized and adopted the act of distraining, it was ruled that the broker had a right to make cognizance of the taking, as bailiff of the executrix under the Statute(*x*), although the distress was made before probate.

19. If an administrator make an underlease of a chattel interest which belonged to the intestate, reserving rent to himself, his executors, &c., the personal representatives(*y*) of the administrator, and not the administrator *de bonis non* of the intestate shall have the rent, and such personal representatives of the lessor may distrain under the Statute(*z*) 3 & 4 Vict. c. 105, for any arrear of rent which accrued due in his life-time, but as the reversion belongs to the administrator *de bonis non* of the intestate, no distress lies for rent becoming due after the decease of such lessor.

20. If a testator seised in fee devise his estate in lands, together with such rent as shall be owing to him at the time of his decease, the devisee will be entitled to distrain for any rent falling due after the testator's death, as being incident to the reversion, but the arrears of rent which accrued due in his life-time belong to his executor and not to the devisee, and a distress for such arrears can only be supported in the executor's name: devisees, like heirs, have a right to distrain in respect of their estate in the reversion, but where a chattel real is specifically bequeathed, the legatee cannot distrain for the rent, unless the executor assent to the bequest, for until such assent be given, the term continues vested in the executor.

If a person seised in fee bind his goods and lands to the payment of a yearly rent to J. S., this is a good rent-charge(*a*) conferring a right

(*v*) *Turner v. Lee*, Cro. Car. 471.

(*w*) *Whitehead v. Taylor*, 10 Ad. & Ell. 210; 2 P. & Dav. 367, S. C.

(*x*) 10 Car. I. Sess. 2, c. 5, Irish; 32 Hen. VIII. c. 37, English.

(*y*) *Drue v. Baylye*, 1 Freem. 392-403; 2 Lev. 100; 3 Keb. 298-495;

Norton v. Harvy, 1 Ventr. 259.

(*z*) 3 & 4 Vict. c. 105, ss. 61, 62, Ir.; 3 & 4 Will. IV. c. 42, ss. 37, 38, Eng.

(*a*) *Spicer's case*, Year Book, 18 Edw. III. fo. 32, pl. 7; 18 Assis. fo. 54, pl. 1; Co. Litt. 147, A.

of distress, though there are no express words of charge, nor to distrain : so where lands were devised by a testator to his widow for life, with remainders over, subject to and charged with the payment(*b*) of twenty pounds yearly to J. S. during her life, to be paid by the widow so long as she should live, and after her death, by the persons in remainder, it was ruled that the annuity was a direct charge on the lands which might be recovered by distress.

21. Upon the execution of a mortgage, the legal estate in the mortgaged premises immediately vests in the mortgagee, and unless previously demised to tenants, the mortgagee(*c*) has a right to enter(*d*) into the actual possession, and if the lands were subject to prior leases, the mortgagee, being assignee of the reversion, may levy by distress the rents reserved by such prior leases. If the mortgagee choose to enter into receipt of the rents of lands which were demised *prior* to the mortgage, he must serve notice on the tenants requiring them to pay him or his agent all rents due, or to become due from them out of the mortgaged premises, and after such notice the mortgagee has a right to distrain(*e*) for all rents due from the tenants at the time of delivering such notice, and which shall afterwards become due : any rents paid to the mortgagor prior to such notice, are considered to have been received with the assent of the mortgagee, and such payments are protected by the Statute(*f*) abolishing the necessity of attornment.

Leases granted by a mortgagor after the execution and registry of a deed of mortgage, are absolutely void(*g*) as against the mortgagee, and the mortgagor may be treated as a trespasser, and he and all persons deriving from him subsequently to the mortgage, may be evicted without notice to quit or demand of possession. Where a lease is made by the mortgagor subsequently to the mortgage, and the mortgagee afterwards requires that the rent should be paid to him(*h*), and *it is paid accordingly*, the relation of landlord and tenant may arise between the parties, as it would be absurd to compel the mortgagee to go through the form of an ejectment, in order to put the occupier in the position

(*b*) *Buttery v. Robinson*, 3 Bing. 392 ; *Dennett v. Pass*, 1 Bing. N. C. 388 ; 1 Scott, 218 ; *Bodham v. Berry*, 4 Prop. Law. 36.

(*c*) See Coote on Mortgages, 415.

(*d*) *Doe dem. Fisher v. Giles*, 5 Bing. 421 ; 2 Moo. & P. 749, S. C.

(*e*) *Moss v. Gallimore*, 1 Doug. 279 ; *Pope v. Biggs*, 9 B. & Cress. 245 ; 4 Mann. & Ry. 193, S. C.

(*f*) 6 Anne, c. 10, s. 10, Irish ; 4

Anne, c. 16, s. 10, English.

(*g*) *Keech dem. Warne v. Hall*, 1 Doug. 21 ; *Thunder dem. Weaver v. Belcher*, 4 East, 449.

(*h*) *Doe dem. Higginbotham v. Barton*, 11 Ad. & Ell. 307-315 ; 3 P. & Dav. 198 ; *Rogers v. Humphreys*, 4 Ad. & Ell. 299 ; 5 Nev. & M. 511, S. C. ; *Kingsmill v. Watson*, 2 Huds. & Br. 608 ; and see *Pope v. Biggs*, 9 B. & Cress. 245 ; 4 Mann. & Ry. 193.

of tenant. However, the mere fact of notice by the mortgagee to the tenant of the mortgagor holding under a lease posterior to the mortgage, will not of itself cause the tenant(i) to hold of the mortgagee, and enable him to distrain for rent payable by such tenant: but if the tenant(j) agree to pay his rent pursuant to the notice, a yearly tenancy is created between the mortgagee and the tenant, according to the terms of the demise made by the mortgagor.

Where it was covenanted by the mortgage deed, that the mortgagor, while he continued in possession, should pay an annual rent(k) of fifty pounds to the mortgagee, and that the mortgagee should have such remedies by distress and sale for its recovery, as landlords have upon common demises for recovery of rent, provided that such reservation should not prejudice the mortgagee's right to enter into possession, and evict the mortgagor and all other tenants and occupiers of the premises, it was ruled, that a distress by the mortgagee for a year's rent did not create the relation of landlord and tenant between the parties, and that after making such distress, the mortgagee might evict the mortgagor by ejectment, without any previous notice to quit.

A mortgagee of lands in Ireland is seldom advised to enter into receipt of the rents, or to interfere with the possession of the mortgaged premises: the course usually adopted is to proceed in a Court of Equity, either on petition(l), or by bill to have a receiver appointed over the property. A mortgagor in possession has a right to distrain for rent issuing out of any part of the premises demised by him subsequently to the mortgage, but he cannot sustain a distress in his own name for rent reserved by lease made prior to the mortgage.

22. It was formerly the practice for the sheriff to deliver(m) actual possession of a moiety of the debtor's freehold lands to the *elegit* creditor; but the course subsequently pursued has been to procure a return to the writ of *elegit*, that the sheriff has delivered such possession, and the creditor then proceeds by ejectment to establish his right: tenants in possession holding under leases made after the entry of the judgment on which the writ of *elegit* is founded, either may be evicted, or must execute deeds of attornment(n), covenanting with the creditor for payment of their rents, and authorizing him to distrain in case of

(i) *Evans v. Elliott*, 9 Ad. & Ell. 342; 1 P. & Dav. 256, S. C.; *Waddilove v. Barnett*, 2 Bing. N. C. 538; 2 Scott, 763, S. C.

(j) *Brown v. Storey*, 1 Mann. & Gr. 117; 7 Scott, N. C. 9; see *Wheeler v. Branscombe*, 7 Jurist, 1131.

(k) *Doe dem. Garrod v. Olley*, 4 P.

& Dav. 275; 12 Ad. & Ell. 481.

(l) 12 Geo. III. c. 10, Irish.

(m) *Taylor v. Cole*, 3 T. R. 295; *Underhill v. Devereux*, 2 Saund. 69, A, note 3.

(n) 15 Geo. II. c. 8, s. 8, Irish; 11 Geo. II. c. 19, s. 11, English.

non-payment. It was generally supposed that a creditor by *elegit* could not obtain actual possession of extended lands without an ejectment, and could not enforce payment of rent from an occupying tenant of the premises by action or distress, without previous attornment; but Gibbs, Ch. Justice(o), stated, he had always entertained a different opinion; and that if the sheriff found the land in the debtor's possession, he might put the creditor into actual possession without any ejectment; and if the lands were in possession of tenants holding under prior demises, they were thenceforward bound to pay their rents to the creditor: however, it has been since settled, that tenants by *elegit*(p) cannot enforce payment of rent from a person holding the land by lease prior to the judgment on which the *elegit* was founded, either by action or by distress, without previously obtaining an attornment from the lessee, or without the interposition of a Court of Equity. A creditor by *elegit* may evict the possession of a tenant holding by lease made subsequently to the rendition of the judgment, but has no right to distrain for the rent payable by such lessee, as no privity of contract or of estate exists between such parties, unless an attornment be executed.

However, by the provisions of the Irish Statute(q) 3 & 4 Vict. c. 105, the sheriff, under a writ of *elegit*, is authorized to make and deliver execution unto the party suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as the person against whom execution is sued, or any person in trust for him shall have been seised or possessed of, at the time of entering up the judgement. Where a writ of *elegit* was delivered to the sheriff before any rent became due, but the inquisition was not taken until after(r) half a year's rent had accrued, it was ruled that the execution creditor was not entitled to recover the half year's rent, as such arrear was merely a chose in action, and was no part of the reversion.

23. The remedy by *elegit* has been greatly facilitated by the Irish Statute(s) 5 & 6 Will. IV. c. 55, which enables any person entitled to sue out, or who has sued out a writ of *elegit* upon any judgement recovered in any of the superior Courts at Dublin, on petition to a Court of Equity, to have a receiver appointed over the whole of the debtor's land, or a

(o) Rogers v. Pitcher, 6 Taunt. 202-206; 1 Marsh. 541, S. C.; and see Lefroy on Elegit; 2 Cruise's Digest, title Stat. Merchant.

(p) Harris v. Booker, 4 Bing. 96; 12 Moore, 283; Walshe v. Onge, 4 Law Rec. 162, 2nd Ser.; Cooper v. Smith, 4 Law Rec. 166, 2nd Ser.; and see Doe

dem. Hull v. Greenhill, 4 B. & Ald. 684; Co. Litt. 321, B.

(q) 3 & 4 Vict. c. 105, s. 19, Irish; 1 & 2 Vict. c. 110, s. 20, English.

(r) Sharp v. Key, 9 Mees. & W. 379; 9 Dowl. Pr. Ca. 770, S. C.; Barry v. Wilkinson, 1 Irish Eq. Rep. 564.

(s) 5 & 6 Will. IV. c. 55, s. 31, Irish.

competent part thereof: and by the Statute(*t*) 3 & 4 Vict. c. 105, s. 21, any person entitled to sue out, or who has already sued out any writ of *elegit* upon any judgement recovered in any of Her Majesty's Courts at Dublin, is authorized to apply by petition to the Court of Chancery, or to the Court of Exchequer in Equity, for an order that a receiver may be appointed over any lands, tenements, &c., the property of the debtor, which could be made available for payment of such judgement debt under the Act. The proceeding by appointment of a receiver in equity has been found so much preferable to extending the property of the debtor at law, that the latter mode of enforcing payment of a debt due by judgement has been almost wholly abandoned.

24. A receiver is a person appointed by a Court of Equity to collect the rents(*u*) and profits of lands, or other property, the subject of litigation, and is an officer(*v*) of the Court for that purpose, and under its order and control. Receivers are also appointed for the protection and management of the property of infants and lunatics, and for the benefit of creditors by judgement, or mortgage. After a person has been approved of as receiver by one of the Masters in Chancery, and has entered into the usual recognizance, an order(*w*) must be entered and served on the immediate tenants of the property over which he has been appointed, requiring payment of their rents; and whenever rent shall be in arrear for five months after it shall have become due, in case of a half-yearly reservation; or for two months after rent shall become due, in case it is reserved by quarterly payments; or so soon as it shall become due, in case such rent is payable weekly (or at any time after any half-yearly or quarterly rent shall have become due, if the Master shall deem it expedient to allow him to do so), to proceed by distress for recovery of such rent, without any rule or order for that purpose.

The receiver cannot support a distress upon lands of which the person(*x*) over whose interest he is appointed remains in possession; and an order must be obtained that the officer of the Court shall proceed to let the premises in the defendant's possession. When a receiver is appointed over the interest of a lessee(*y*), the landlord is not suffered to

(*t*) 3 & 4 Vict. c. 105, s. 21, Irish; there is no corresponding enactment in any English Statute.

(*u*) Smith on Receivers.

(*v*) White v. Baugh, 9 Bligh's P. C. 181; 3 Cl. & Finn. 44; Salwey v. Salwey, 4 Russ. 60; 2 My. & K. 215.

(*w*) General Orders of the Court of

Chancery, Rules 145 and 146; and see the General Orders of the Exchequer in Equity, Rules 131 and 132.

(*x*) Griffith v. Griffith, 2 Ves. S. 400; and see the General Order of the Exchequer, No. 131.

(*y*) Walsh v. Walsh, 1 Irish Eq. Rep. 209.

distrain for the rent to which he is entitled, without obtaining an order of the Court for liberty to proceed at law; but where a receiver is placed over the estate of an inheritor or superior landlord, and the lands are occupied by under-tenants(*z*), the intermediate tenant may distrain the occupiers for rent without any order for that purpose: the inconvenience and expense sustained by landlords from the appointment of a receiver over the interests of tenants, has caused the introduction of a condition into leases at rack-rents, rendering such leases void, in case any order appointing or extending a receiver over the demised premises shall be carried into effect.

The receiver, having no estate in the lands, in case a replevin be issued, can only make conusance as bailiff, in the name of such persons as are, at law, entitled to the rents, and being considered as the agent of all parties in the suit, he is not bound to produce(*a*) any express authority warranting or recognizing his right to distrain: every agent has an implied authority(*b*) to do all subordinate acts which are usually incident to, or are necessary to effectuate the principal object in the most convenient manner: an authority to receive a debt enables the agent to cause(*c*) the debtor to be arrested; and so an authority to collect rents, and to distrain for the amount, entitles the agent himself to distrain, or to employ(*d*) a bailiff or other fit person to effect such distress. A receiver in an Equity cause, having demised to the plaintiff in replevin for years, reserving a rent of twenty pounds yearly to the then, or to any future receiver, it was objected(*e*), that as the nature of the lessor's title appeared by the lease, the conusance should have been made in the names of the persons beneficially interested, and not in the name of the receiver, and that he could not distrain, as he had no reversion in the premises; but the Court held, that the plaintiff having taken a lease from the receiver could not be suffered to dispute the lessor's title.

25. Where any proceeding at law is instituted(*f*), for the purpose of contesting the title of officers appointed by a Court of Equity, whether receivers or committees, without leave of the Court, the prosecu-

(*z*) But see *Lord Lanesborough, a Lunatic*, 3 Law Rec. 240 and 249, 1st Series.

(*a*) *Bennett v. Robins*, 5 Carr. & P. 379; *Brandon v. Brandon*, 5 Madd. 473.

(*b*) *Bac. Abr. Leases*, J. 8; *Howard v. Baillie*, 2 H. Bla. 618; *Richardson v. Anderson*, 1 Campb. N. P. C. 43, note.

(*c*) *Randal v. Harvey*, Godb. 358; 2 Ro. Rep. 390; *Walter v. Rumball*, 4 Mod. 385, 388; 3 *Ld. Raym.* 75, 78.

(*d*) *Tomlinson v. Benson*, 1 Ro. Abr.

339; *Baylife*, C. pl. 4; *Robinson v. Hofman*, 4 Bing. 502; 1 Moo. & P. 474; *Bennett v. Robins*, 5 Carr. & P. 379; *Eagleton v. Gutteridge*, 11 Mees. & W. 465.

(*e*) *Dancer v. Hastings*, 4 Bing. 2; 12 Moo. 34, S. C.

(*f*) *Aston v. Heron*, 2 M. & Keen, 390; *Lees v. Waring*, 2 Moll. 216; and see *Angel v. Smith*, 9 Ves. 335.

tion of the action will be restrained, and the persons concerned in bringing it are liable to punishment, as for a contempt: because, if an ejectment on the title could be maintained against the possession of a receiver, the order appointing him would be indirectly discharged, or its execution frustrated. Where the process of a Court of Equity has been irregularly or illegally executed, and the proceedings have been set aside, and the party discharged from custody, the Court exercises a discretionary authority in restraining an action(*g*) against its officer for false imprisonment, and will not only prevent any other tribunal from judging of the regularity of its orders, but from examining into the regularity of their execution. The acts of the receiver in the administration of an estate, are the acts of the Court, and if any wrong has been committed(*h*) by him in conducting a distress for rent, the Court, if it thinks fit, may assert and assume exclusive jurisdiction of the matter, but is not bound to exclude the intervention of other tribunals, if, upon the facts disclosed, such a course should be deemed preferable. A receiver having levied by distress(*i*) a sum due for rent, the tenant brought an action of trespass against him and against the bailiff who made the levy; an injunction was granted to restrain further proceedings at law, because it was not shewn there had been any irregularity in the performance of the receiver's duty, nor was any distinct question raised of contested right, proper for the cognizance of common law Courts.

If a tenant replevy chattels distrained by a receiver, or commence an action against the receiver or his bailiff for any alleged irregularity(*j*) in the conduct of a distress, the receiver should obtain the directions of the Court on the subject, and under ordinary circumstances, the matter of complaint against the officer will be referred to one of the Masters of the Court for investigation, and the action will be restrained.

26. A bailiff may collect rents, and enforce their payment(*k*) by distress, under a parol or verbal authority from the landlord, and does not require any warrant in writing for that purpose, but if the bailiff

(*g*) *Frowd v. Lawrence*, 1 Jac. & W. 655; *Clarke, ex parte*, 1 Russ. & M. 563; *Chalie v. Pickering*, 1 Keen's Rep. 749; *Hyde v. Holmes*, 2 Moll. 373; *Batchelor v. Blake*, 1 Hogan, 98; *Phillips v. Worth*, 2 Russ. & M. 638.

(*h*) *Aston v. Heron*, 2 M. & Keen, 396; *Swaby v. Dickon*, 5 Simons, 629; *Johnes v. Claughton*, Jacob. 573; *Bricknell v. Stamford*, 1 Beav. 368.

(*i*) *Aston v. Heron*, 2 M. & Keen, 390; *Nugent v. Nugent*, 2 Moll. 372; and see *Pry dem. Townsend v. Ejector*, Alc. & Napier, 228.

(*j*) *Swaby v. Dickon*, 5 Simons, 629.

(*k*) *Sir John Souch's case*, Cro. Eliz. 22; *Moor*, 141, case 282; *Robson v. Douglas*, 1 Freem. 535; 3 Lev. 20; *Coles v. Trecothick*, 9 Vesey, 250.

be not known to the tenants, or if rescue or riot be apprehended, he should be furnished with a warrant, signed by the principal or his authorized agent, directing the bailiff to levy by distress a specified sum due for rent out of a particular farm or dwelling-house. A warrant authorizing a bailiff to distrain need not be under seal, and does not require any stamp.

If a person distrain as bailiff of another, without any authority for that purpose, and afterwards he in whose right the distress was made recognize the bailiff's authority, such assent(*l*) shall have relation to the time of distraining, and be as effectual as a prior warrant to distrain provided such distress were made(*m*) for the benefit of the person ratifying the seizure. Lord Wynford observes that the subsequent sanction of an(*n*) agent's acts is more satisfactory than an authority given beforehand, because where an authority is given beforehand, the party must trust to his agent, but if given subsequently, the party knows that a has been done according to his wishes. Where a distress was commenced(*o*) by a bailiff after the death of his principal, a subsequent recognition of the bailiff's acts in carrying on the distress, by the party interested, was deemed sufficient: and a distress has been sustained upon a ratification given(*p*), after plea pleaded, by a person in whose the legal estate in the premises was vested.

An instrument in writing given to a bankrupt by his assignees, authorizing the tenants of certain premises, which had been the property of the bankrupt prior to his failure, to pay their rents to him, and to take his receipts as a discharge, does not confer(*q*) on him any power to distrain, though the rents were to be received for his own benefit.

27. Where a bailiff or agent exceeds his authority, and is guilty of misconduct in distraining goods privileged by law from distress(*r*), the landlord is *primâ facie* liable for the acts of the bailiff or agent employed by him, but if the landlord, as soon as he becomes acquainted

(*l*) Year Book, 7 Hen. IV. fo. 34, case 1, by Gascoigne, C. J.; 1 Ro. Abr. 339; Baylife, B., pl. 2; Godb. 110, case 129, by Anderson, C. J.; 2 Leon. 196, case 246; Whitehead v. Taylor, 10 Adol. & Ell. 210; 2 P. & Dav. 367; Hull v. Pickersgill, 1 Brod. & B. 282; 3 Moore, 612; Potter v. North, 1 Saund. 347, C. note 4.

(*m*) Wilson v. Barker, 4 B. & Ald. 614; 1 Nev. & M. 409, S. C.; 4 Instit. 317.

(*n*) Maclean v. Dunn, 4 Bing. 722; 1 Moo. & P. 761, S. C.

(*o*) Whitehead v. Taylor, 10 Adol. & Ell. 210; 2 P. & Dav. 367, S. C.; Ratihabitio mandato æquipollet. Dig. lib. 46, tit. 3, s. 12.

(*p*) Myles v. Johnston, 3 Law Rep. 16, first ser.; Hull v. Pickersgill, 1 Brod. & B. 282; 3 Moore, 612; Duncan v. Meikleham, 3 Carr. & P. 172; but see Taylerson v. Peters, 2 Nev. & P. 62; by Lord Denman.

(*q*) Ward v. Shew, 9 Bing. 609; Moo. & Sc. 756, in an action of trover.

(*r*) Hurry v. Rickman, 1 Moo. & Rol. 126.

with the circumstance, repudiates and disclaims the unauthorized acts of his agent, and does not derive any benefit from them, he will not be answerable: the landlord, however, must extricate himself by proof from the *primâ facie* liability imposed on him by his bailiff's act, and the mere non-concurrence of the employer will be insufficient for that purpose.

A master is responsible for the conduct of his bailiff or servant in doing a *lawful* act negligently, but an act done by a servant without authority, which is altogether unlawful, will not expose his master to an action of trespass for the injury sustained: where parties occupied adjoining gardens, and it appeared that the plaintiff's horse had been trespassing on the defendant's garden, but after having escaped(s) into the highway, the defendant's servant drove back the horse into his master's garden, and then distrained it damage-*feasant*: the same servant had, on other occasions, distrained cattle trespassing in the same garden, by his master's directions, but it was ruled, in an action of trespass against the master, that a *primâ facie* case had not been made out, shewing that the master had authorized the distress, and the Court also held that the master had not adopted his servant's act by pleading a justification. If my servant, without my knowledge(t), put my cattle upon another's land, he is the trespasser, and not his employer, because it was his own act, for otherwise it would be in a servant's power(u) to subject his master to any actions or penalties he pleased: or if I command my servant to distrain, and he ride the(v) horse, which he took as a distress, he shall be punishable, and not his master.

Where bailiffs distrained lawfully for rent, but during the night got drunk, broke some furniture, and were guilty of other gross misconduct(w); in an action of trespass against the landlord who employed them, it was ruled that he was not answerable for the wilful and unauthorized acts of his bailiffs, committed by them to his prejudice: the cases in which landlords have been made responsible for trespasses(x) committed by their servants in the care and conduct of a distress, are all cases in which the landlords have taken a part personally, either by acting or directing, or in which they have assented to acts done for

(s) *Lyons v. Martin*, 3 Nev. & P. 509; 8 Adol. & Ell. 512; *M'Kenzie v. M'Leod*, 10 Bing. 385.

(t) 2 Ro. Abr. 553, *Trespass*, 2, pl. 1.

(u) *Kingston v. Booth*, Skinn. 228.

(v) Year Book, 21 Hen. VII. fo. 23, case 21, by Rede, C. J.; Bro. Abr.

Trespass, pl. 211; Noy's Maxims, by Bythewood, c. 44, fo. 218.

(w) *Thynne v. Russell*, 1 Jebb & Symes, 155.

(x) *Thynne v. Russell*, 1 Jebb & S. 161.

their benefit. However, the mere ratification of a previous trespass does not make the party ratifying a trespasser(*y*) : it was laid down by Gascoyne, C. J.(*z*), that if a bailiff take a heriot, claiming property in it for himself, the subsequent assent of the lord to the caption, for services due to him, would not excuse the trespass : but if he had taken the cattle as bailiff of the lord, and not for himself, without any authority, the subsequent ratification of the lord would be sufficient to make him bailiff at the time ; for the assent(*a*) shall have relation to the time of the distress taken. A landlord or master may be responsible for the negligence of his bailiffs or servants, in the performance of a duty intrusted to them(*b*), but where he is so liable, the action must be brought in case, and not in trespass.

28. Any one joint-tenant may constitute a bailiff to distrain(*c*) for rent due to him and his companions, without their assent, as one joint-tenant may recover the whole arrear of rent, and give a valid discharge for the full amount, and having authority to distrain for himself and for others, it is the same thing whether he distrains by himself or by a bailiff. If a joint-tenant grant a rent-charge, the cattle of his companion are not distrainable(*d*) for the arrears, because such cattle are lawfully upon the land, by an independent right. A surviving joint-tenant may distrain for arrears of rent which accrued due in the lifetime of his companion(*e*), as well as for rent which afterwards became due in his own time.

Tenants in common hold by different titles, have several estates, and are entitled to receive their several proportions of the reserved rent from the occupying tenants : a lessee holding under two tenants in common, having paid his entire rent to one of them, after getting notice from the other requiring payment of his share, it was ruled(*f*), that the party giving the notice might afterwards distrain for his proportion of the rent. If one tenant in common demise for years, and the lessee assign(*g*) his interest to the other tenant in common, the lessor may distrain for his rent, and in like manner, under a lease by

(*y*) *Wilson v. Tummon*, 21 Law Jour. 306.

(*z*) Year Book, 7 Hen. IV. fo. 34, pl. 1 ; Bro. Abr. Tresp. pl. 86 ; 18 Vin. Abr. Ratihabitio, A. 1 ; *Fuller v. Trimwell*, 2 Leon. 215.

(*a*) Godb. 110 ; 2 Leon. 196, S. C.

(*b*) *Turner v. Hawkins*, 1 Bos. & P. 472.

(*c*) *Robinson v. Hofman*, 4 Bing. 562 ;

1 Moo. & P. 474 ; *Leigh v. Shepherd*, 2 Brod. & B. 465 ; 5 Moore, 297, S. C.

(*d*) 1 Ro. Abr. 669, Distress, I. pl. 26 ; Com. Dig. Distress, B. 2.

(*e*) Year Book, 33 Hen. VI. fo. 20, pl. 15, par Choke et Littleton ; 2 Ro. Abr. 86, Joint-Tenants, B. pl. 1.

(*f*) *Harrison v. Barnby*, 5 T. R. 246.

(*g*) *Hudson v. Snellgar*, 2 Ro. Rep. 212 ; *Snellgar v. Henston*, Cro. Jac. 611.

one tenant in common of his undivided share to his companion(*h*) at a yearly rent, a distress may be supported.

A corporation aggregate may authorize a bailiff to distrain for rent without writing(*i*), but they can only appoint a bailiff by deed to enter upon lands for a condition broken, in order to revest their estate : however, if the agent or chamberlain of a corporate body demise lands(*j*), and the tenant enter and pay rent to the corporation under such letting, a tenancy from year to year is raised by legal construction, and the corporation may distrain.

29. A rent service becomes apportionable, when the reversion to which it is incident is severed or divided by grant or devise, and each grantee or devisee(*k*) severally may recover his own share by action of debt, or by distress ; and the distress may be sustained, whether the party distraining be an assignee of *part of the reversion*, or an(*l*) assignee of the reversion *only in part* of the demised premises : so a devise of part of a rent, though severed from the reversion(*m*), is a valid apportionment, and is recoverable in like manner ; but a tenant is not bound by an arbitrary apportionment of his rent made by his landlord without his assent(*n*), and is entitled to have the amount fixed by the verdict of a jury, to which his holding is to continue subject. A rent-charge may be divided by the owner, either by devise, or by any conveyance operating under the Statute of Uses, so as to enable the assignee(*o*) of each portion to distrain separately for his undivided share.

(*h*) Fitzh. Abr. Avowrie, pl. 241.

(*i*) Smith v. The Birmingham Gas-Light Co., 1 Ad. & Ell. 526 ; 3 Nev. & M. 771, S. C. ; Doe *dem.* Dean of Rochester v. Pierce, 2 Campb. N. P. C. 96 ; Cary v. Matthews, 1 Salk. 191 ; Vin. Abr. Bailiff, B. pl. 5 ; Manby v. Long, 3 Lev. 107.

(*j*) Wood v. Tate, 2 New Rep. 247.

(*k*) Roberts v. Snell, 1 Mann. & Gr. 577 ; West v. Lassels, Cro. Eliz. 851 ; Collins v. Harding, 13 Rep. 57, B. ; Cro. El. 606, 622 ; Walter v. Maunde, 1 Jac. & W. 181 ; Harrison v. Barnby, 5 T. R. 246 ; Wyat Wild's case, 8 Rep. 79 ; Co. Litt. 148.

(*l*) Roberts v. Snell, 1 Mann. & Gr. 577.

(*m*) Ard v. Watkins, Cro. Eliz. 651 ; Moor. 549 ; 1 Ro. Abr. 234, Apportionment, B. pl. 4 ; Ewer v. Moyle, Cro. Eliz. 771.

(*n*) Bliss v. Collins, 5 B. & Ald. 876 ; 1 D. & Ry. 291 ; Same case in Equity, 4 Madd. 229, and on appeal, 1 Jac. & W. 426.

(*o*) Ravis v. Watson, 5 Mees. & W. 255 ; Colborne v. Wright, 2 Lev. 239 ; Thos. Jones, 119, S. C. ; but see Executors of Kennedy v. Stewart, 4 Law Rec. 160, N. S.

CHAPTER II.

DISTRESS.

AT WHAT TIME.

- 30. *Rent need not be demanded prior to distraining.*
- 31. *Unless reserved payable off the Land; or as a penal Rent; or the Days of Payment are uncertain.*
- 32. *Rent-Days cannot be varied by Parol.*
- 33. *Distress made illegal by previous Tender.*
- 34. *Distress after Sunset, and before Sunrise: on Sunday.*
- 35. *Distress [by Statute for six Months after Lease determined.*
- 36. *Fraudulent Removal of Chattels.*
- 37. *Several Distresses for the same Gale of Rent.*

EXEMPTIONS FROM.

- 38. *Goods not distrainable at common Law, unless capable of being restored in the same Condition.*
- 39. *Animals untamed not liable to Distress.*
- 40. *Things fixed to the Freehold.*

- 41. *Growing Crops.*
- 42. *Goods sent to be wrought or manufactured.*
- 43. *Chattels supplied by Owner for the Benefit of his own Trade.*
- 44. *Chattels exempted for public Convenience.*
- 45. *Indemnity to Bailiff making Distress.*
- 46. *Goods in actual Use.*
- 47. *Beasts of the Plough.*
- 48. *Goods in Custody of the Law.*
- 49. *Goods of Bankrupt Tenant.*
- 50. *— of Insolvent Debtor.*
- 51. *Landlord allowed a Year's Rent out of Goods under Execution.*
- 52. *Sheriff bound to retain a Year's Rent for Landlord.*
- 53. *Sheriff not bound to seize, until Landlord's Demand satisfied.*
- 54. *Landlord only entitled to Rent due at the Time of Seizure.*
- 55. *Right confined to immediate Landlord.*
- 56. *To what Execution Statute is applicable.*
- 57. *Rights of the Crown.*

30. RENT not being payable until the last moment of the natural day upon which it is reserved, a distress cannot be maintained for it until the following day(a), so that if half a year's rent fall due on Lady-day, the landlord has no right to distrain until the following day: where a lease contains a clause of distress, in case the rent shall be behind, after(b) being lawfully demanded, or after(c) reasonable demand, there is no necessity for demanding the rent before distraining, for such a clause is only introduced in furtherance of the power to distrain given by the common law; and though an express clause be inserted in a lease, authorizing a distress, in case the rent be unpaid for a week(d),

(a) *Aske v. Brounlet*, Year Book, 21 Hen. VI. fo. 40; *Duppa v. Mayo*, 1 Saund. 287.

(b) *Browne v. Dunnery*, Hob. 208; *Hutton*, 23; *Kingswell v. Crawley*, Moor. 883; *Gilb. on Rents*, 75, 79.

(c) *Doe dem. Ld. Shrewsbury v. Wilson*, 5 B. & Ald. 363, 383; 2 Ro. Abr. 426; *Rent*, I. Pl. 1 and 2; *Bac. Abr. Conditions*, O. 2.

(d) *Co. Litt.* 204, B.

or for a month after it becomes due, the lessor may distrain upon the day after it accrues, as the words are affirmative, and cannot restrain that which is incident of common right to every rent-service.

31. If rent be reserved payable at a place off the land, with a clause, that after lawful demand made at such place, then the lessor may distrain, a previous(*e*) demand of the rent must be made at the appointed place, in order to warrant a distress, because the place which the law appoints for payment has been altered by agreement of the parties: and if a landlord proceed, by distress, for recovery of a penal rent, or penalties, a previous(*f*) demand is requisite; for though, in ordinary cases, a distress for rent includes a demand, because the tenant ought to be in attendance to pay his rent, when due, yet a tenant is not bound to be in readiness to pay a penal rent(*g*) *before notice*, as he cannot be aware whether the landlord means to insist on the penalty, and, therefore, in such cases, a distress cannot be deemed equivalent to a demand, and an actual demand, *in fact*, must be previously made. It is to be observed, however, that the assignee of a leasehold interest is only chargeable(*h*) with penalties incurred during his ownership.

Where the contract does not afford precise notice of the time for payment of the rent, a demand(*i*) must be made, *in fact*, prior to a distress: rent being reserved payable quarterly, or half-quarterly if required, and being received for the first year in quarterly payments, it was ruled that a distress for a half-quarter's rent could not be sustained, without an express request.

32. Premises being let by agreement in writing at a yearly rent, without specifying any days of payment, the tenant, after the contract had been signed, said he would like to pay his rent quarterly; several quarterly payments were made, and the landlord having distrained for a quarter's rent, it was ruled, in an action for an illegal distress(*j*), that nothing but a new agreement between parties, operating as a fresh demise on different terms of letting, could put an end to the original contract, and that, under a written agreement stipulating for a yearly reservation, a distress for a quarter's rent could not be sustained.

33. Tender of the rent in arrear made before(*k*), or at the time of

(*e*) *Browne v. Dunnery*, Hobart, 208, 2 Ro. Abr. 426; Rent. I. pl. 3; Gilb. Rents, 78.

(*f*) *Browne v. Dunnery*, Hob. 208; *Lamb v. West*, Hutt. 114.

(*g*) *Mallam v. Arden*, 10 Bing. 299; 3 Moo. & Sc. 793.

(*h*) *Thynn v. Chomley*, Moor. 357; Cro. Eliz. 383; Gouldsb. 129-186.

(*i*) *Mallam v. Arden*, 10 Bing. 299; 3 Moo. & Sc. 793.

(*j*) *Turner v. Allday*, Tyrw. & Gr. 819; but see *Lysaght v. Callanan*, Hayes, 141-152.

(*k*) *The Six Carpenters' case*, 8 Rep. 147, A.; 2 Instit. 107; *Hobbs v. Escot*, 2 Sid. 40; and see *post*, Replevin, Book V. c. 7, No. 71.

distraining(*l*), renders the distress tortious: and tender before pounding makes(*m*) the detainer, and not the taking, wrongful detainer after impounding(*n*) comes too late, and does not make the taking or detaining unlawful, the cause being put to the trial by law, to be there determined: in like manner, tender of amend after distraining(*o*) makes a distress taken damage-*feasant* unlawful when made after distress, and before the impounding, the detainer of the cattle becomes unlawful. Cattle which were distrained damage-*feasant*, being placed(*p*) in a private pound, until they could be moved to a public pound, it was decided that tender of amend after the cattle remained in the private pound, was made in sufficient time, but a tender after goods(*q*) were distrained *for rent*, and impounded on the demised premises pursuant to the Statute, was held to be too late.

By the English Statute(*r*), 11 Geo. II. c. 19, it is enacted that a landlord shall distrain growing crops for rent in arrear, and that the tenant or his assigns shall pay or tender to such landlord, or his known agent, the whole rent then in arrear, with the full costs and charges at such distress, at any time before such crops shall be ripe, and before they are cut, cured, or gathered, the distress shall thereupon be restored. The Irish Statute(*s*), authorizing the distress of growing crops for rent, does not contain any similar provision, but recites, that it is required that the remedies of landlords in Ireland should, in this respect, be as extensive as they are in England; it is therefore not unreasonable to infer, that a distress of growing crops made in Ireland, for rent, may be redeemed by tender of such rent, with the costs and charges, at any time before such crops have been gathered.

34. In order to afford a tenant an opportunity of preventing distress by tendering his rent, the landlord is not permitted to distrain for rent during the interval between(*t*) sunset and sunrise; but a distress may be taken in the night-time(*u*), damage-*feasant*, for other

(*l*) Fortescue v. Jones, Noy. 22.

(*m*) Evans v. Elliott, 6 Nev. & M. 606, and the notes; 5 Ad. & Ell. 142; Browne v. Powell, 4 Bing. 230; 12 Moo. 454; Ladd v. Thomas, 12 Ad. & Ell. 117; 4 P. & Dav. 9; Vertue v. Beasley, 1 Moo. & Rob. 21.

(*n*) Pilkington v. Hastings, Cro. El. 813; 5 Rep. 76; Sheriff v. James, 1 Bing. 341; 8 Moo. 234; Firth v. Purvis, 5 T. R. 432; Ellis v. Taylor, 8 Mees. & W. 415; Anscomb v. Shore, 1 Campb. N. P. C. 285; 2 Chitty's Plead. 723, 5th edition.

(*o*) Browne v. Powell, 4 Bing. 230;

12 Moo. 454; 2 Ro. Abr. 561, G. pl. 7; Bro. Abr. Replevin Fitzh. Nat. Br. 69, G.; Year Hen. IV. fo. 17, pl. 14.

(*p*) Browne v. Powell, 4 Bing. 230; 12 Moo. 454.

(*q*) Firth v. Purvis, 5 T. R.

(*r*) 11 Geo. II. c. 19, s. 9, E.

(*s*) 56 Geo. III. c. 88, s. 15,

(*t*) Co. Litt. 142, A.; Year Hen. IV. fo. 5, pl. 18; Read v. Brownlow, 176; Aldenburgh v. 6 Carr. & P. 212.

(*u*) Co. Litt. 142, A.

cattle might be gone before they could be seized, being only liable to distress while in the act of trespassing. The same principle which prohibits a distress for rent in the night-time, equally applies to prevent a landlord from distraining for his rent(*v*) on Sunday, because the law does not presume that the tenant attends upon the land prepared to pay his rent on that day. A distress for rent does not come within the strict meaning(*w*) of a proceeding at law, as the party does not require the aid of a court of justice for the purpose, and cannot be considered as process within the provisions of the Statute(*x*) "for the better observation of the Lord's Day." A demand of rent made on Sunday(*y*) has been held sufficient to support an ejectment for a forfeiture; but in the absence of express decision on the subject, the authority of Sheppard, in his Abridgement, may be relied on, as shewing the opinion entertained in his time, that at common law no such distress for rent could be sustained.

35. By the common law, a lessor had no right to distrain for rent reserved by lease, after the determination of the demise, by which the privity of estate existing between the parties was destroyed; nor could any distress be lawfully made for rent falling due(*z*) on the last day of the term, because such rent not being payable until the last moment of the day, a distress could not be levied until after the lease had expired. For the purpose of obviating this inconvenience, it was enacted by the Irish Statute(*a*), 9 Anne, c. 8, that it shall be lawful for any person having any rent in arrear, or due upon any lease for life, or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of such respective leases, in the same manner as they might have done if such leases had not been ended or determined, *provided* that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant, *or those(b) claiming under him*, from whom such arrears became due.

If the tenant die before the term expires, and his personal represen-

(*v*) 1 Shepp. Abr. 566, title, Distress; This book appears to have been printed A. D. 1675, prior to the enactment of the English Statute for the observance of the Lord's Day, which was passed A. D. 1677; and see Spelman's Original of Terms, 76 and 93; Com. Dig. Temps. B. 3; Twigg v. Potts, 3 Tyrw. 969; Lessee Cowan v. Chambers, Hayes, 546.

(*w*) Hughes v. Ring, 1 Jac. & W. 392.

(*x*) 7 Will. III. c. 17, Irish; 29 Car. II. c. 7, English.

(*y*) Lessee Cowan v. Chambers, Hayes, 546.

(*z*) Co. Litt. 47, B. and Hargr. note 304.

(*a*) 9 Anne, c. 8, s. 7, Irish; 8 Anne c. 14, ss. 6 and 7, English.

(*b*) The words, "*or those claiming under him*," are not in the English Statute.

tatives enter into possession, and continue to hold the premises after the expiration of the term, the landlord may(c), within the period prescribed, distrain for arrears which accrued, as well before as after the tenant's decease. So where a tenant, by his landlord's permission, remains in possession(d) of part of a farm, after the expiration of his tenancy, the landlord may distrain on that part within six months after the end of the tenancy, and it is settled(e) that the Statute is not confined to a tortious holding over, or to cases where the tenant remains in possession of the whole farm. There must, however, be a keeping possession of some part of the farm, to the exclusion of other people, in order to render the Statute applicable; and the mere circumstance of the tenant leaving cattle on the land after he had quitted, will not be sufficient. The tenant of a farm having remained(f) for a few days after the expiration of his lease, and after the entry of the new tenant, went away, leaving a cow and some pigs on the land, without giving any intimation of a purpose to return, or to continue holding any part of the land: it was decided, that the landlord was not justified in distraining the property so left, for arrears of rent due by the late tenant, under the Statute. Where part of the tenant's corn remained in a barn on the demised premises, beyond the period of six months after the expiration of the lease, but within the time allowed by the custom of the country for the outgoing tenant to get in and dispose of his crop, it was held(g), that the corn might be distrained for rent due by the outgoing tenant, upon the principle, that if by the tacit consent of landlord and tenant the agreement between them is extended beyond the time for which they originally contracted, all the rights and properties incident to the original tenancy(h) must be continued.

After judgement in ejectment for non-payment of rent(i), the landlord may, within six months next ensuing the day of the demise laid in the declaration, distrain for the rent on account of which the ejectment had been brought, as there is nothing in the Statute(j) limiting the particular mode by which leases shall be determined, and such a distress made after judgement in ejectment(k), is not a waiver of the for-

(c) *Braithwaite v. Cooksey*, 1 H. Bla. 465.

(d) *Nuttall v. Staunton*, 4 B. & Cress. 51; 6 Dowl. & Ry. 155, S. C.; *Staniford v. Sinclair*, 2 Bing. 193; 9 Moore, 376.

(e) *Nuttall v. Staunton*, 4 B. & Cress. by Ld. Tenterden, 56; *Taylerson v. Peters*, 7 Ad. & Ell. 110-114; 2 Nev. & P. 622, S. C.

(f) *Taylerson v. Peters*, 7 Adol. &

Ellis, 110; 2 Nev. & P. 622, S. C.

(g) *Lewis v. Harris*, 1 H. Blackst. 7, note; *Beavan v. Delahay*, 1 H. Bla. 8; *Boraston v. Green*, 16 East, 81, by Bayley, J.

(h) *Beavan v. Delahay*, 1 H. Bla. 8.

(i) *Dwyer v. Peacock*, 2 Fox & Smith, 34.

(j) 9 Anne, c. 8, s. 7, Irish; 8 Anne, c. 14, ss. 6 and 7, Eng.

(k) *Dwyer v. Peacock*, 2 Fox & Smith,

feiture incurred by non-payment of rent. The landlord, after having served a summons in ejectment for non-payment of rent, may distrain for rent which had previously become due(*l*), without defeating his prior proceedings, provided it shall be proved upon the trial of the ejectment, or by affidavit, in case of judgement by default, that, after giving credit for the produce of the distress, an arrear of rent remains due sufficient to support the ejectment. The pendency of an ejectment on the title, brought for the purpose of defeating a lease alleged to have been made contrary to a leasing power, does not deprive the reversioner of his remedy by distress(*m*) for rent reserved by the lease, either previously due, or subsequently accruing.

It was observed by Patteson, J., at *Nisi Prius*(*n*), that the Statute of Anne, which allowed a distress after a tenancy had expired, applied only to cases in which the tenancy had been determined by lapse of time, or perhaps by notice to quit, and not to cases where it had been put an end to by the tenant's own wrongful disclaimer. The Statute, however, does not contain any expression(*o*) fixing the particular mode by which leases shall be determined, but on the contrary embraces all leases for lives, for years, or at will, ended, or determined.

36. According to the common law, if the landlord, coming to distrain for rent, see cattle on the demised premises, and the tenant, in order to prevent a distress, drive them(*p*) off the land, the landlord may make fresh pursuit, and distrain them: but if the landlord did not see the cattle on the premises, he could not lawfully distrain them, though they were driven away on purpose to avoid his distress. However by the Irish Statute(*q*), 9 Anne, c. 8, enlarged and extended by the Irish Statute(*r*), 15 Geo. II. c. 8, it is enacted, that in case any tenant, or *any person*(*s*) *paying any rent-charge*, lessee for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the grant, demise, or holding whereof, any rent is or shall be reserved, due, or made payable, shall

34; *Hartshorne v. Watson*, 4 Bing. N. C. 178; 5 Scott, 506.

(*l*) *Lessee Burchell v. Hanly*, Batty, 17, note; *Cornwalls, Minors*, 1 Hogan, 147; and see the note to 2 Howard's Law Exch. Pr. 104; *Pennant's case*, 3 Rep. 64.

(*m*) *Rogers v. Humphreys*, 4 Ad. & Ell. 299-315; 5 Nev. & M. 511, S. C.

(*n*) *Doe dem. David v. Williams*, 7 Carr. & P. 322.

(*o*) *Dwyer v. Peacock*, 2 Fox & Smith, 42; *Taylorson v. Peters*, 7 Ad. & Ell.

110, by Patteson, J.; 2 Nev. & P. 622, S. C.

(*p*) *Poole v. Longuevill*, 2 Saund. 284, note 2; Cq. Litt. 161, A.; *John's case*, Year Book, 44 Edw. III. fo. 20, pl. 18.

(*q*) 9 Anne, c. 8, s. 3, Irish; 8 Anne, c. 14, s. 2, English.

(*r*) 15 Geo. II. c. 8, s. 1, Irish; 11 Geo. II. c. 19, s. 1, English.

(*s*) The words "person paying any rent-charge," are not in the English Statute.

fraudulently or clandestinely convey away, or carry off or from such premises, his goods or chattels, to prevent the grantee, or grantees of rent-charges, grantor, or grantors of fee-farms, landlords, or lessors, from distraining the same for arrears of rent so reserved, due, or made payable ; it shall be lawful for every grantee, or grantees, landlord, or lessor, or any person by him for that purpose lawfully empowered, within the space of twenty days(*t*) next ensuing such conveying away, or carrying off such goods or chattels, to take and seize such goods and chattels, wherever the same shall be found, as a distress for such arrears of rent, and the same to sell, or otherwise dispose of, in such manner as if such goods and chattels had actually been distrained by such grantee, lessor, or landlord, in and upon the premises, for such arrears of rent : provided that no landlord(*u*), or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods as a distress for the same, which shall be sold *bonâ fide*, and for a valuable consideration, before such seizure made, to any person not privy to such fraud : and that if any such grantor(*v*), fee-farmer, tenant, or lessee, shall fraudulently remove and convey away his goods or chattels, or if any person shall wilfully and knowingly aid or assist any such grantor, fee-farmer, tenant, or lessee, in such fraudulent conveying away, or carrying off of any part of his goods or chattels, or in concealing the same ; every person so offending shall forfeit and pay to the landlord or lessor, from whose estates such goods and chattels were fraudulently carried off, or to the person entitled to such rent-charge, or fee-farm rent, double the value of the goods by him or them respectively carried off, or concealed, to be recovered by action of debt in any of His Majesty's Courts of Record in Dublin. And by the fourth section(*w*) it is enacted, that where the goods or chattels so fraudulently carried off, or concealed, shall not exceed the value of twenty pounds(*x*), it shall be lawful for the grantee, or grantees of rent-charges, grantor of fee-farms, landlord, or lessor, from whose estate such goods or chattels were removed, his or their bailiff, servant, or agent, in his or their behalf, to exhibit a complaint by civil bill against such offender or offenders, before(*y*) the judges of the respective assizes to be held for the several counties wherein such offender or offenders do reside respectively, or before the justices at the quarter-sessions to be held for the county of Dublin, or for

(*t*) "Thirty days" in the English Statute.

(*u*) Section 2.

(*v*) Section 3.

(*w*) 15 Geo. II. c. 8, s. 4, Irish ; 11 Geo. II. c. 19, ss. 4, 5, and 6, English.

(*x*) "Fifty pounds" in the English Statute.

(*y*) By the English Statute, the remedy given is by summary proceeding before two justices of the peace.

nty of the city of Dublin, in case the premises, from which such
 l is made, lie within those districts; who, upon full proof of the
 and also of the value of the goods and chattels by such tenant,
 or other person, so fraudulently carried off or concealed, shall
 and decree the offender or offenders to pay double the value of
 ods and chattels to such grantee or grantees of rent-charges,
 of fee-farms, landlord, or lessor, his or their bailiff, servant, or
 with the like execution, and remedy by appeal, as in other cases
 bill.

preceding Statute is remedial so far as it enlarges the remedy
 he landlord had against his tenant, but is so far penal(z), that the
 l who seeks to visit a third person with its consequences, must
 ie case by strict proof within the words of the enacting clause,
 st shew that such third person assisted in the removal, or con-
 it of the goods, with the intent of preventing the landlord from
 ing. The provisions of the Act do not apply to cases where the
 removes(a) his goods fraudulently and clandestinely *before* the
 comes due; nor is a landlord entitled to follow goods which
 moved after the tenancy had really ceased(b), by reason of the
 l having conveyed away his reversion. A tenant having openly,
 he face of day, with his landlord's knowledge(c), removed his
 without leaving sufficient property on the premises to satisfy
 it, it was determined, that the removal being fraudulent,
 not clandestine, the landlord was justified in distraining the ef-
 hich had been so removed, but it must be proved that sufficient
 (d) was not left on the demised premises to satisfy the arrear of
 Although goods are removed at night by a tenant for the admitted
 of avoiding a distress, yet the removal will not be considered frau-
 e), if the property was carried away under a belief that it was not of
 strainable, and was not done with any view of preventing a right-
 erness. The Statute only extends to the removal of the goods of an
 ate tenant, and not to the removal of the goods of an underte-
 r of a third person, for the cattle of a stranger(f) may be re-

ister v. Brown, 3 D. & Ry.
 Carr. & P. 121, S. C.; Brooke
 es, 8 B. & Cress. 537; 2 Mann.
 70, S. C.

and v. Vaughan, 1 Bing. N. C.
 Scott, 670, S. C.; Watson v.
 Espin. N. P. C. 15; but see Fur-
 Fotherby, 4 Campb. N. P. C.
 opperman v. Smith, 4 D. & Ry.

(b) Ashmore v. Hardy, 7 Carr. & P.
 501.

(c) Opperman v. Smith, 4 Dowl. &
 Ry. 33.

(d) Parry v. Duncan, 7 Bing. 243; 5
 Moo. & P. 19; Moo. & Malk. 533.

(e) John v. Jenkins, 3 Tyrw. 170-
 173; 1 Cro. & Mees. 227, S. C.

(f) Thornton v. Adams, 5 M. & Selw.
 38; Postman v. Hurrell, 6 Carr. & P. 222.

moved by the owner, after the rent of the premises on which they have been placed has fallen due, for the purpose of protecting them against the landlord's distress. The authority conferred on the landlord is merely to follow goods which belonged to the tenant at the time of the removal(*g*), and continued to be his property at the time of the seizure and not even those, if *bonâ fide* transferred to an innocent person, for value.

In an action against a tenant for the fraudulent removal of his goods, in order to avoid a distress, it is not necessary to shew his actual participation in the removal, if done with his privity. In an action against one Wharton, for assisting a tenant in removing, and in concealing his cattle and goods, to hinder the landlord from distraining, it was held unnecessary to prove that the tenant himself took any part in the fraud(*h*), or that the landlord had it in contemplation to distrain, provided he was in fact entitled to distrain at the time of the fraudulent removal; and it is considered a concealment, if cattle are withdrawn from the demised premises, and removed to places in which the landlord was not likely to find them. A creditor may, with his debtor's consent, take possession of and remove the effects of his debtor from demised premises, for the purpose of satisfying a *bonâ fide*(*i*) debt, though the creditor was aware, at the time, that his debtor was in distressed circumstances, and apprehended that the landlord would distrain; but if a tenant were to procure a person to make a pretended purchase of his effects on the premises, and the property was removed under colour of such purchase, the landlord might seize the goods so removed within the prescribed period, or might recover their double value from the pretended purchaser, under the Statute. A plea justifying a distress under this Statute, ought to shew how the demise arose(*j*), and such a plea, stating the demise in general terms, cannot be supported on special demurrer.

It is to be observed, that where goods fraudulently or clandestinely carried away, are put into any house or place locked up, or otherwise secured, so as to prevent their being distrained, the landlord is authorized, by the English Statute(*k*), 11 Geo. II. c. 19, by adopting certain proceedings, to break open such house or place, and distrain the goods, but that the corresponding(*l*) Irish Statute does not contain any similar enactment.

(*g*) Fletcher v. Marillier, 9 Ad. & Ell. 456; 1 P. & Dav. 354, S. C.

(*h*) Stanley v. Wharton, 10 Price, 138; 9 Price, 301-309.

(*i*) Bach v. Meats, 5 M. & Selw. 200.

(*j*) Bowler v. Nicholson, 4 P. & Dav. 16; 12 Ad. & Ell. 341.

(*k*) 11 Geo. II. c. 19, s. 7, English.

(*l*) 15 Geo. II. c. 8, Irish.

37. Every gale of rent forms a distinct debt, and where several successive gales of rent become due, a separate distress may be made for each gale, and the landlord is not obliged to include the whole arrear of rent in a single distress. A person having distrained and avowed for a rent-charge due at Michaelmas, 1659, afterwards distrained and avowed for another portion of the same rent-charge(*m*), which had previously accrued due at Michaelmas, 1658, and it was ruled, that an avowry for rent due at a later day could not be a discharge for rent due at a former day. A landlord has not a right to split the rent due for a whole gale, and distrain for part at one time, and afterwards for the residue, because(*n*) such several distresses for an entire rent are vexatious and oppressive: but if a landlord distrain for one whole gale of rent, and only mistake the value of the goods seized, there is no reason why he should not afterwards complete the execution, by making a further seizure for any deficiency. By the Irish Statute(*o*) 7 Will. III. c. 22, s. 3, it is enacted, that where the value of the cattle distrained shall not be found to be to the value of the arrears distrained for, that the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain again for the residue of such arrears.

38. All cattle and moveable articles found upon demised premises, whether belonging to the tenant or to any other person(*p*), are liable to be distrained by the landlord for his rent, but this general rule is subject to many exceptions and qualifications.

Goods distrained were formerly considered in the nature of a pledge, and such things only were deemed liable to distress(*q*), which could be removed and restored to the tenant without injury to their condition: fruit, milk, and other similar articles were exempted from distress on account of their perishable nature, and neither grain nor flour were suffered to be taken out of a sack, or other repository, nor hay to be taken away from a barn, because the quantity could not be ascertained, nor was corn in sheaf deemed distrainable, because(*r*) the grain must be shed and scattered in the removal, unless it happened to be found in a cart, when it might be conveyed away without injury. However,

(*m*) *Palmer v. Stanage*, 1 Lev. 43; 1 Siderf. 44; *Thos. Raym.* 21, S. C.; *Fountain v. Gnales*, Comb. 59; *Gambrell v. Ld. Falmouth*, 4 Ad. & Ell. 73.

(*n*) *Wallis v. Saville*, 2 Lutw. 532; and see Lord Mansfield's observations in *Hutchins v. Chambers*, 1 Burr. 589; *Anon. Cro. Eliz.* 13, case 8; *Moor.* 7, case 26.

(*o*) 7 Will. III. c. 22, s. 3, Irish; 17 Car. II. c. 7, s. 4, English.

(*p*) *Jason v. Dixon*, 1 M. & Selw. 601.

(*q*) *Gilb. on Distress*, by Hunt, 35; *Johnson v. Falkner*, 2 G. & Dav. 184; 2 Q. B. Rep. 925, S. C.

(*r*) *Cowper v. Pollard*, W. Jones, 197; *Co. Litt.* 47, A.; *Year Book*, 21 Hen. VII. fo. 39, pl. 55.

by the Irish Statute(*s*) 7 Will. III. c. 22, ss. 4, 5, it is enacted, that it shall be lawful for any person having rent arrear and due upon any demise, lease, or contract, to seize and secure any sheaves or cocks of corn, or corn loose, or in the straw, or hay lying or being in any barn, or granary, or upon any hovel, stack, or rick, or otherwise, upon any part of the land charged with such rent, and to lock up or distrain the same in the place where the same shall be found, for or in the nature of a distress, until the same shall be replevied upon good security to be given to the sheriff; and in case such distress shall not be replevied or owned within the space of eight days(*t*) next after the taking thereof, then the same to be appraised and sold according to the laws and customs of this kingdom: provided that such corn, grain, or hay so distrained, be not removed by the person distraining to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there as impounded, until the same shall be replevied or sold.

The preceding Act extends to corn threshed(*u*) or unthreshed, and it is probable that the ancient rule of the common law, with respect to the perishable nature of the goods, in cases of distress for rent, would only be deemed(*v*) applicable to articles which were liable to deterioration, within the period prescribed by the statute law for the sale of distresses, and it may be stated, as a general proposition(*w*), that all moveable chattels are distrainable, whatever may have been said in former times, restraining a distress to those things which partook of the profits of the soil.

39. It is laid down by Lord Coke(*x*), that dogs, deer, and other animals which are *feræ naturæ* are not distrainable for rent, as no person can have a valuable property in them, but it is observed by(*y*) Willes, C. J., that the nature of such things is so much altered, that the reason given for the rule fails, as it is clear that a person may have a valuable property in a dog: it is now established(*z*), that deer in an enclosed park may be distrained for rent, and the same principle applies to any animals which have been tamed or domesticated, or which are confined and yield profit to the owner.

40. Things fixed to the freehold(*a*), or belonging to the realty, are

(*s*) 7 Will. III. c. 22, ss. 4, 5, Irish;
2 Will. & M. Sess. 1, c. 6, s. 3, Eng.

(*t*) Five days in the English Act.

(*u*) *Bellasyse v. Burbridge*, 1 Lutw. 214.

(*v*) *Bradby on Distresses*, 148.

(*w*) *Gorton v. Falkner*, 4 T. R. 567, by Ld. Kenyon.

(*x*) Co. Litt. 47, A.; Bro. Abr. Pro-

perty, pl. 20.

(*y*) *Davies v. Powell*, Willes' Rep. 46.

(*z*) Sir W. Filow's case, Year Book, 12 Hen. VIII. fo. 3; Bro. Abr. Property, pl. 44.

(*a*) *Pitt v. Shew*, 4 B. & Ald. 206; *Simpson v. Hartopp*, Willes, 512; *Twigg v. Potts*, 3 Tyrw. 969; 1 Cro. M. & R. 89; *Darby v. Harris*, 1 Q. B. Rep. 895;

not distrainable, and this rule applies not only to subjects, which by annexation become an inseparable parcel of the inheritance, but to fixtures put up by a tenant for purposes of trade, or of ornament, and which he has a right to remove at any time before the expiration of his term : not only furnaces, chimney-pieces, grates, steam-engines, and fixed machinery are exempted from liability to distress, but matters constructively annexed, or belonging to the freehold, such as doors(*b*), windows, keys, and implements necessary for working such machines, are protected : and this privilege is extended to a fixture detached for the purpose of being repaired, for if a mill-stone be removed(*c*), that it should be picked and hammered for the use of the mill, the protection is continued. Upon the same principle(*d*), charters and muniments of title, which are deemed parcel of the inheritance, are not liable to distress. Machinery erected in a factory, and only secured by bolts and screws, though capable of being removed and replaced elsewhere without sustaining injury, is not subject to distress(*e*), and even where such machinery is seized and severed under an execution at the suit of a creditor, the landlord is not entitled to payment of a year's rent out of the proceeds of the sale, because the object of the Statute(*f*) was only to compensate the landlord for the right of distress, of which he was deprived by the execution.

41. Growing crops, being deemed parcel of the inheritance, were not, by the common law, distrainable for rent, but by the Irish Statute(*g*) 56 Geo. III. c. 88, it is enacted, that it shall be lawful for every lessor or landlord, or his steward, bailiff, receiver, or other person empowered by him, to take and seize as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruit, pulse, or other product whatsoever, which shall be growing on any part of the estate so demised or holden, as a distress for arrears of rent ; and the same to cut, gather, make, cure, carry and lay up, *when ripe*, in the barns, or other place on the premises so demised or holden ; and in case there shall be no barn or proper place on the premises so demised or holden, then in any other barns or proper place which such lessor or landlord shall hire, or otherwise procure for that purpose, and as near as may

1 G. & Dav. 234 ; Dalton v. Whittem,
3 G. & Dav. 260.

(*b*) Bro. Abr. Distresse, pl. 29.

(*c*) Wystow's case, Year Book, 14
Hen. VIII. fo. 25, pl. 6 ; Gorton v.
Falkner, 4 T. R. 566.

(*d*) Bro. Abr. Distresse, pl. 29 ; Brown-
low, 168.

(*e*) Amos & Ferr, 259 ; and see Duck
v. Braddyl, M'Clell. 217 ; 13 Price, 455,
S. C. ; Darby v. Harris, 1 Q. B. Rep.
895 ; 1 G. & Dav. 234.

(*f*) 9 Anne, c. 8, s. 1, Irish ; 8 Anne,
c. 14, s. 1, Eng.

(*g*) 56 Geo. III. c. 88, s. 15, Irish ;
11 Geo. II. c. 19, s. 8, English.

be to the premises, and dispose of the same towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress and sale, in the same manner as any other goods and chattels distrained for non-payment of rent.

This Statute does not extend to trees, shrubs, or plants growing in nursery ground(*h*), because the word "product" is confined to such matters as are capable of ripening, and of being cut, gathered, and made up when ripe. Standing corn, growing potatoes, or other crops distrained for rent(*i*) cannot be sold, until after they become ripe, and have been severed or gathered, and must afterwards be put up in barns, or other proper places on the demised premises, or if there be no such proper place, then they may be removed to such barn as the landlord can conveniently procure, and situated as near to the demised premises as circumstances will permit. Growing crops seized by the sheriff under an *execution*, may be immediately sold, before they are ripe or have attained maturity, and after such sale cannot be distrained for rent accruing due to the landlord(*j*) subsequently to the sale by the sheriff, unless the purchaser suffer them to remain on the ground for a longer time(*k*) than is necessary for their proper growth and management: but the sheriff is answerable to the landlord for any sum not exceeding one year's rent, due out of the premises at the time of the seizure. Where a tenant, upon the expiration of his lease, is entitled to emblements or growing crops, which are suffered to remain on the lands for purposes of husbandry, they are not liable(*l*) to be distrained for rent due by the succeeding tenant, as the outgoing tenant is allowed a reasonable time to save his crops, which privilege would be unavailing, if they were liable to distress for rent becoming due from an incoming tenant.

The Statute authorizing the distress and sale of growing crops, does not confer any such right on the grantee of a rent-charge: the grantee of a rent-charge being empowered to detain(*m*), manage, sell and dispose of any distress made for such rent-charge, in the same manner, in all respects, as distresses for rent reserved upon leases for years

(*h*) *Clarke v. Gaskarth*, 8 Taunt. 431; 2 Moore, 491; *Clarke v. Calvert*, 8 Taunt. 754; 3 Moo. 114.

(*i*) *Owen v. Legh*, 3 B. & Ald. 470; *Proudlove v. Twemlow*, 3 Tyrw. 260; 1 Cro. & M. 326, S. C.

(*j*) *Peacock v. Purvis*, 2 Brod. & B. 362; 5 Moo. 79; *Wright v. Dewes*, 1 Ad. & Ell. 641; 3 Nev. & M. 790.

(*k*) *Parslow v. Cripps*, 1 Com. Rep. 204.

(*l*) *Eaton v. Southby*, Willes, 131—136

(*m*) *Miller v. Green*, in Error, 8 Bing. 92—107; 1 Moo. & Sc. 199; 2 Tyrw. 1; 2 Cro. & Jerv. 143, S. C.; and see *Johnson v. Falkner*, 2 G. & Dav. 184; 2 Q. B. Rep. 925, S. C.

uch annuity was a rent reserved upon a lease for years, it was d in the Exchequer Chamber, that these words were fully y holding them to grant the powers given to landlords under sh Statute(*n*) 2 Will. & Mary, c. 5, without extending ie new subject of distress granted by the English Statute(*o*) I. c. 19, as such power ought to be construed strictly, and cially where it was sought to bring within its operation the rops of a stranger to the deed: but the grantee of a rent- , with a similar clause of distress, has a right, under the Irish), to distrain and sell oats and hay in stacks or trusses, in the ner as a landlord may proceed for recovery of his rent. A ill be answerable in damages, if he distrain an unreasonable) or extent of growing crops, either alone or jointly with erty, for though such crops may not, at the time of seizure, ale, yet the tenant may be exposed to inconvenience and in- ding sureties to join in a replevin bond, or by being deprived nion over his property.

oods delivered to a person(*s*) carrying on trade or business, rpose of being wrought, manufactured, worked up, or ma- he course of such employment, or to a carrier for hire, are from distress: yarn(*t*) sent to a weaver, or cloth to a tailor, o a bookbinder, or goods(*u*) delivered to tradesmen, artifi- arriers(*w*), factors(*x*), wharfingers, auctioneers(*y*), carcass- or warehouse-keepers(*z*), in the way of their respective trades, oted from liability to distress: so corn sent to a mill to be r to a market for sale, or a horse standing in a smith's forge l, or sent with corn to market, and put up(*a*) for a time in a use, or a horse carrying corn to a mill, and remaining at the while the corn is being ground, are not liable to distress;

ill. & Mary, c. 5, Eng.; 25
13, s. 5, Irish.
eo. II. c. 19, Eng.; 56 Geo.
s. 15, Irish.
son v. Falkner, 2 G. & Dav.
B. Rep. 925, S. C.
eo. II. c. 13, s. 5, Irish; 2
ry, Sess. 1, c. 5, s. 3, Eng.
ot v. Birtles, 1 Mees. & W.
. & Gr. 729.
son v. Hartopp, Willes, 512;
. Hurst, 1 Salk. 250; Brown
Ad. & Ell. 138; 4 Nev. &
uspratt v. Gregory, in Error,
W. 677; Tyrw. & Gr. 1086.
att. 47, A.; 1 Ro. Abr. 668;

Distress, J. pl. 11.

(*u*) Muspratt v. Gregory, 3 Mees. &
W. 680.

(*v*) Gilman v. Elton, 3 Br. & B. 75;
6 Moo. 243.

(*w*) Thompson v. Mashiter, 1 Bing.
283; 8 Moore, 254.

(*x*) Adams v. Grane, 3 Tyrw. 326;
1 Cro. & M. 380.

(*y*) Brown v. Shevil, 2 Ad. & Ell.
138; 4 Nev. & M. 277.

(*z*) Matthias v. Mesnard, 2 Carr. &
P. 353.

(*a*) Read v. Burley, Cro. El. 549-
596; Noy. 68.

and upon the same principle, where wool was sent to be spun, and the owner having taken his horse to bring back the yarn, he and the owner, by leave of a neighbour, who had a beam and scales in his house, went there to weigh the yarn, and while employed in doing so the landlord of the house(*b*) distrained the horse and the yarn for his rent, and it was ruled, that the goods being under the personal(*c*) care of the owner, were privileged from distress, and the horse, as being accessory to the goods.

It was formerly held, that cattle on their way to Smithfield-market, in London, for the purpose of being sold there, which were put to graze, for the night immediately preceding the market-day, in a field, by leave of the tenant and with the landlord's consent, might be distrained(*d*) for rent due to the landlord; but the owner of the cattle was afterwards relieved in Equity, in consequence of the fraud and subterfuge of the landlord(*e*), who had given his consent that the cattle should remain on the pasture during the night, and he was ordered to pay the costs both at law and in Equity. However, it has been expressly decided, that cattle on their way to Smithfield-market, in Dublin, for the purpose of sale, which were put to graze(*f*) for the night next preceding the market-day, were privileged from distress at the suit of the landlord, for rent-service due to him out of the pasturage. So cattle put to graze by leave of the occupier, for a single night, on their way to a fair(*g*), are protected against the landlord's distress for rent due to him out of the close.

43. The exemption from distress for rent is only allowed for the benefit of the person's trade to whom the goods are sent, and not for the benefit of the trade carried on by the owner of the property: upon this ground it was ruled(*h*) that brewers' casks, containing beer sent by the brewer to a public-house, and left there until the beer was consumed, were liable to be distrained for the rent of the house. Materials supplied by a manufacturer to a weaver, to be worked up by him at his own residence, are privileged from distress for rent due by the workman to his landlord; but a frame, or other machinery(*i*), delivered

(*b*) *Read v. Burley*, Cro. Eliz. 549-596; Noy. 68, S. C.

(*c*) *Muspratt v. Gregory*, 1 Mees. & W. 650; Tyrw. & Gr. 1105, by Bolland, Baron, and 1095, by Parke, Baron.

(*d*) *Fowkes v. Joyce*, 3 Lev. 260; 2 Lutw. 1161; 2 Ventr. 50; and see *Horsford v. Webster*, 1 Cro. M. & Rosc. 696; 5 Tyrw. 409, S. C.

(*e*) *Fowkes v. Joyce*, Prec. in Chan. 7; 2 Vern. 129, S. C.

(*f*) *Nugent v. Kirwan*, 1 Jebb & 97; *Poole v. Longueville*, 2 Saund. note 7; *Muspratt v. Gregory*, 1 Mees. & W. 638, by Parke, Baron.

(*g*) *Tate v. Glead*, 3 Bla. Comm. note 4, by Christian.

(*h*) *Joule v. Jackson*, 6 Mees. & W. 450, overruling a contrary dictum in *Gisbourn v. Hurst*, 1 Salk. 250.

(*i*) *Wood v. Clarke*, 1 Cro. & J. 1; 1 Tyrw. 315, S. C.; *Gorton v. Fal-*

by the manufacturer, together with the materials, to be employed in the weaver's house in working up such materials, is not included in the privilege, unless there be sufficient distress on the premises to discharge the rent, exclusively of such implement of trade. Lord Lyndhurst observes(*j*), that the material to be worked upon is privileged, that the conveyance by which it is carried to and from the place of manufacture is privileged; that it is privileged in the hands of a carrier, whilst he is carrying it; in the hands of a factor to whom it is consigned; and in the hands and warehouse of a wharfinger where it is lodged and deposited; but that no such privilege extends to the machinery of the employer, by which the material is to be worked up, and that it is not necessary for the protection of trade such privilege should exist.

Where premises were used for the manufacture of salt, which was carried away in boats belonging to the purchasers, conducted, for the purpose of receiving the load, along a canal made on the premises communicating with a public navigation, it was adjudged(*k*) that the boat of an alkali-manufacturer, lying in the canal for the purpose of carrying away salt to be used in the production of the alkali, was not privileged from distress for arrears of a rent-charge(*l*), granted by the owner of the salt-works and the maker and vendor of the salt, out of the lands on which such salt works were erected, because the boat never was delivered to the person exercising the business, and was not placed under his charge, or in his custody, but was left by the owner for his own convenience, in the place where it was distrained.

44. The carriages, or other property of a guest at a public inn are exempted from liability to distress, upon principles(*m*) of public convenience; but where a private chariot, standing(*n*) at a livery-stable, was distrained for rent, the Court of King's Bench ruled it was not protected, because its standing formed part of the profits of the premises, and because the carriage was staying there(*o*) permanently, and so occupied the premises out of which the rent was payable. A tenant possessed of a stable, in consideration of a guinea, allowed an inn-keeper to make use of it during the race week: a race-horse was brought by

4 T.R. 565; and see *Fenton v. Logan*, 9 Bing. 676; 3 Moo. & Sc. 82, S. C.; *Gibson v. Ireson*, 3 Q. B. Rep. 39.

(*j*) *Wood v. Clarke*, 1 Cro. & J. 498.

(*k*) *Muspratt v. Gregory*, 1 Mees. & W. 633; Tyrw. & Gr. 1086; and same case in Error, 3 Mees. & W. 677.

(*l*) *Saffery v. Elgood*, 1 Ad. & Ell. 191; 3 Nev. & M. 346; *Kimp v. Cruves*, 2 Lutw. 1673.

(*m*) *Robinson v. Walter*, 3 Bulstrode, 269; and see *Skipwith's case*, 1 Bulst. 170; Year Book, 22 Edw. IV. fo. 49, plac. 15, *par* Brian, Ch. J.

(*n*) *Francis v. Wyatt*, 3 Burr. 1499; 1 W. Bla. 483, S. C.; *Robinson v. Walter*, 3 Bulst. 269; Gilb. by Hunt, 40.

(*o*) See *Adams v. Grane*, 1 Cro. & M. 381, by Bayley, Baron; and *Brown v. Shevil*, 4 Nev. & M. 283, by Patteson, J.

the owner to the inn, and was placed by the inn-keeper in the stable which he had hired, and which was distant half-a-mile from the inn : it was ruled(*p*) that the privilege of the inn did not extend to the stable, and that the race-horse was distrainable for rent due out of the stable to the chief-landlord. If a lodger leave his furniture in a public lodging-house ; or if a farmer, having brought malt to a brewer, leave his cart in the yard(*q*), intending to bring back grains or beer when ready to be loaded, such things are not exempted from liability to distress : and if horses or cattle, the property of a third person(*r*), are sent by their owner to graze or agist upon a farm, at a certain price, they may be distrained by the landlord for his rent, and the owner is left to his remedy against the farmer ; but though the agistment-money be unpaid, the farmer(*s*) has no right to distrain such cattle for the money.

If a stranger's cattle, by default(*t*) of their owner, or by breaking fences then in a state of repair, escape into a tenant's farm, they are immediately distrainable for rent due out of the farm, without being *levant and couchant* ; but if the cattle escape, through the default of the tenant in not maintaining a sufficient fence, they cannot be distrained by the landlord for rent-service until they have been *levant and couchant*, nor even afterwards, for rent reserved by lease, unless the owner of the cattle, after notice(*u*), neglect to remove them ; but the lord of the fee, or grantee of a rent-charge, who have nothing to do with the fences, may, in such cases, distrain the cattle, after they have been *levant and couchant*, though no notice be given to the owner ; such notice being only required where there has been default.

45. A broker who enters under an ordinary distress-warrant, and takes goods on the premises, which are privileged from distress by law, has no right to look for an indemnity to his employer, for, in most cases, the broker has a better opportunity of informing himself as to any exemption from liability to distress, which may belong to goods found upon the premises, than the landlord or his agent possibly can have : however, where a landlord's attorney employed a broker to distrain for rent due to his client, and a distress being made, some of the goods were claimed by the owners as being privileged, when the broker required and obtained an indemnity from his employer : the owners of

(*p*) Crozier v. Tomkinson, 2 Ld. Kenyon, 439 ; Barnes, 472 ; 3 Burr. 1500, cited.

(*q*) Muspratt v. Gregory, 3 Mees. & W. 681, by Ld. Denman, Ch. J.

(*r*) 1 Ro. Abr. 669, Distresse, pl. 23.

(*s*) Bro. Abr. Distresse, plac. 67.

(*t*) Hargr. note 301, to Co. Litt. 47, B. ; Poole v. Longueville, 2 Saund. 290, note 7 ; Kimp v. Cruwes, 2 Lutw. 1580 ; Reynolds v. Oakley, 1 Brownl. 170 ; Hob. 165.

(*u*) See Gill v. Gawin, 2 Ro. Rep. 124.

and goods having recovered(*v*) compensation, it was decided that the party who gave the indemnity was bound to make good the loss the broker had sustained.

Articles in actual use are also privileged from distress, such as the horse upon which a person is riding, the clothes(*x*) which he is wearing, the hatchet(*y*), or utensils of trade, with which he is using. And such exemptions(*z*) are allowed, not merely for the convenience of trade, but for the preservation of peace. Upon the same principle, a loom, or stocking-frame(*a*), when in actual use by a weaver, is not subject to distress, but may be distrained, unless employed in actual use where no other sufficient distress is to be found on the premises. It has been ruled, that clothes which a tenant and his family have in their daily(*b*) habit of wearing might be distrained for rent, although the family were in bed, not being then in actual use.

Articles in actual use are not only privileged from distress for rent, but from distress damage *feasant*. A horse which a person is riding is not subject to distress, while trespassing(*c*) on a field of corn, for the same reason. And though, at one time, it was held(*d*) that horses drawing a cart with corn, and under the care of a carter, might be distrained, and for that purpose might be removed from the cart, it is now settled that horses(*e*) harnessed to a cart or carriage, under the care of a driver, and in actual use, are not subject to distress for damage *feasant*.

Traps and nets cannot be distrained damage *feasant* in a warren, while in the hands(*f*) of a person using them; but in an action of trespass for seizing a dog, where the defendant pleaded that the dog was used damage *feasant*, a demurrer was allowed to the replication. It was alleged that, at the time of the caption, the dog was in the possession(*g*) of H. B., then being the plaintiff's servant, and was used by such servant, and under his personal care, because

v. Grane, 5 Bing. N. C. 620, where the form of the writ is given.

v. Robinson, 6 T. R. 138; note 293 to Co. Litt. 47, A. *Distress Bindon's case*, Moor,

Co. Litt. 47, A.; Bradby on Dis-

v. Falkner, 4 T. R. 567.

n v. Hartopp, Willes, 512.

v. Caldwell, 1 Espin. N.P.

Baynes v. Smith, Peake's

N. P. C. 36; 1 Espin. N. P. C. 206.

(*c*) Fitzh. Abr. Avowrie, pl. 199; 1 Ro. Abr. 664, Distress, A. pl. 4; Harg. note 293 to Co. Litt. 47, A.

(*d*) *Welch v. Bell*, 2 Keb. 529-595; 1 Ventr. 36; 1 Siderf. 422-440.

(*e*) *Field v. Adames*, 4 P. & Dav. 504; 12 Ad. & Ell. 644, S. C.; Bradby, Distr. 143.

(*f*) Fitzh. Abr. Avowrie, pl. 182; 1 Ro. Abr. 664; Distresse, A. pl. 2.

(*g*) *Bunch v. Kennington*, 4 P. & Dav. 509; 1 Q. B. Rep. 679, S. C.

a dog may be in use, when hunting game at a distance from its master, and out of his sight.

47. By the common law(*h*), beasts of the plough, sheep, implements(*i*) of husbandry, utensils(*j*) of trade, and other things necessary for the cultivation of land, or for the support of the farmer, were privileged(*k*) from distress for rent, though not in actual use, while other property was to be found sufficient to answer the landlord's demand: and it was expressly declared by Statute(*l*), 51 Hen. III. stat. 4, that no man shall be distrained by his beasts, that gain his land, nor by his sheep, while other sufficient distress can be found, unless damage *feasant*. Where beasts of the plough and other goods were distrained, and it appeared by the result of the sale, that the property distrained, exclusively of the beasts of the plough(*m*), would have been sufficient to discharge the rent in arrear, the Court held that an action for an illegal distress could not be sustained, as there were reasonable grounds for believing, at the time of making the caption, that, without taking the beasts of the plough, the other goods would not have produced enough to satisfy the rent in arrear. A landlord is not liable to an action for an illegal distress, in taking and selling beasts of the plough, though there was other sufficient distress on the premises, if such other distress included growing-crops(*n*), and the distrainable property, exclusively of such growing-crops, would have been insufficient, because the landlord has a right to resort to such subjects of distress as are immediately available, and he is not obliged to take those which cannot be rendered productive until a future period.

48. It is a general rule(*o*), that cattle or goods *in the custody of the law* are not distrainable for rent, as it would produce great inconvenience and confusion, if goods actually under distress or execution were liable to any other legal distress; for although a distress is merely the act of the party, without any previous legal authority, yet as the person, whose goods are distrained, may try the right by replevin, such chattels, while they continue under distress, are

(*h*) 2 Inst. 132; Dawson v. Alford, 3 Dyer, 312, A.

(*i*) Fenton v. Logan, 9 Bing. 676; 3 Moo. & Sc. 82.

(*j*) Roberts v. Jackson, Peake's Addl. Ca. 36.

(*k*) Simpson v. Hartopp, Willes, 512; Gorton v. Falkner, 4 T. R. 565; Wood v. Clarke, 1 Cro. & Jerv. 484; 1 Tyrw. 315, S. C.

(*l*) 51 Hen. III. st. 4, Eng. & Irish; 28 Edw. I. c. 12, *articuli super chartas*.

(*m*) Jenner v. Yolland, 6 Price, 3.

(*n*) Piggott v. Birtles, 1 Mees. & W. 441; Tyrw. & Gr. 729; Lessee Warington v. Hodgins, Batty, 330, in the note.

(*o*) Whitley v. Roberts, M'Clell. & Y. 107; The King v. Cotton, 2 Vez. S. 288; Parker's Rep. 113.

deemed to be in custody of the law. If an intermediate tenant distrain the goods of his undertenant(*p*) for rent, while such distress continues, the chief-landlord cannot take the same goods for his rent, which have already been placed in custody of the law. In like manner, neither goods seized on demised premises, under an execution, extent, or other legal process(*q*), nor even cattle distrained damage *feasant*(*r*) are liable to distress for rent; and it is to be observed that growing crops, or other chattels seized on demised premises, and sold *bonâ fide* under execution(*s*), or distress, are not again liable to seizure for rent, or by legal process, until the purchaser, under such execution, or distress, has been allowed reasonable time for their removal from the premises. However, goods distrained for rent may be seized under an extent for a debt due to the Crown(*t*), at any time before the property has been changed by actual sale, but are not liable to be taken in execution(*u*), at the suit of a private person. Goods restored to a tenant by replevin, are not considered in legal custody, and may be distrained, pending the replevin suit(*v*) for rent which accrued due subsequently to the original caption.

49. Prior to the Irish Bankrupt Act(*w*), the goods of a bankrupt tenant continued liable to the landlord's distress for rent, even after the assignment(*x*) by the commissioners, and while the assignee remained in possession, in the same manner as if no bankruptcy(*y*) had taken place. By the Irish Statute(*z*) 6 & 7 Will. IV. c. 14, it is enacted, that no distress for rent made and levied after an act of bankruptcy, upon the goods or effects of any bankrupt (whether before or after issuing the commission) shall be available for more than one year's rent accrued prior to the date of the commission, but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor under the commission for the overplus of rent due, and for which the distress shall not be available: and if the assignees(*a*) accept any lease or agreement for a lease belonging to the bankrupt, he is discharged from liability for rent accruing due after the date of the commission: and if

(*p*) Bro. Abr. Distresse, pl. 74.

(*q*) Monk's case, 1 Ventr. 121.

(*r*) Co. Litt. 47, A.; Gilb. by Hunt, 50.

(*s*) Peacock v. Purvis, 2 Bro. & B. 362; 5 Moore, 79; Wright v. Dewes, 1 Ad. & Ell. 641; 3 Nev. & M. 790.

(*t*) The King v. Cotton, 2 Vez. Sen. 288.

(*u*) Bro. Abr. Pledges, pl. 28.

(*v*) Seven v. Mihill, 1 Ld. Ken. 370;

Hefford v. Alger, 1 Taunt. 218.

(*w*) 6 & 7 Will. IV. c. 14, Irish; 6 Geo. IV. c. 16, English.

(*x*) Dillon, *ex parte*, 1 Atk. 104; Plummer, *ex parte*, 1 Atk. 103; Buckley v. Taylor, 2 T. R. 600.

(*y*) 1 Cooke's Bankrupt Law, 175.

(*z*) 6 & 7 Will. IV. c. 14, s. 88, Irish; 6 Geo. IV. c. 16, s. 74, English.

(*a*) 6 & 7 Will. IV. c. 14, s. 89, Irish; 6 Geo. IV. c. 16, s. 75, English.

the assignees decline to do so, the bankrupt is exonerated from liability, in case he deliver up such lease, or agreement for a lease, to the landlord, within fourteen days, after notice that his assignees have declined.

Goods seized by a messenger under a *fiat* in bankruptcy are not, while in his custody, privileged from distress for rent; but by the Statute the landlord can only recover by distress one year's rent due prior to the bankruptcy(*b*), and until the lease, or agreement for a lease, be actually given up, the landlord retains his right to distrain for rent intermediately falling due, though the bankrupt is exonerated from personal responsibility. Where a landlord to whom a quarter's rent was due, distrained the effects of a third person on the premises of his tenant for rent: the tenant afterwards became bankrupt, and obtained his certificate, and it was ruled(*c*), that the only effect of the certificate was to discharge the person and goods of the bankrupt, and not to release any collateral remedies for the rent, and that it did not afford any answer to an avowry for the rent for which the distress was made.

A tenant having replevied goods distrained for rent, he and his sureties in the replevin bond were declared bankrupt, while the replevin suit was depending: the assignees of the bankrupt(*d*) tenant having sold the goods, it was decided that the landlord had no lien on the goods, nor any remedy against the assignees. A landlord having distrained for rent in arrear before the bankruptcy of his tenant, agreed to take the goods, according to the appraisement, in satisfaction of his rent, but suffered them to remain on the premises in the custody of the bankrupt's wife: a commission of bankrupt having issued against the tenant, the landlord again distrained(*e*) the same goods, then in possession of the provisional assignee, for the same arrear of rent, and it was decided that the second distress could not be supported, as the goods passed to the bankrupt's assignee, being in the order and disposition of the bankrupt at the time of his bankruptcy, and by means of the first distress, the whole arrear of rent was satisfied.

50. By the Irish Insolvent Act(*f*) 3 & 4 Vict. c. 107, it is enacted, that no distress for rent *made and levied* after the arrest, or other commencement of the imprisonment of any person, whose estate shall by order (of the Court for relief of insolvent debtors) have been vested in

(*b*) *Briggs v. Sowry*, 8 Mees. & W. 427.
729.

(*c*) *Newton v. Scott*, 9 Mees. & W. 434; 10 Mees. & W. 471, S. C.; affirmed in error.

(*d*) *Bradyll v. Ball*, 1 Bro. Cha. Ca.

(*e*) *Shuttleworth, ex parte*, 1 Deac. & Ch. 223.

(*f*) 3 & 4 Vict. c. 107, s. 46, Irish; 1 & 2 Vict. c. 110, s. 58, English.

the provisional assignee, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the making of such (vesting) order, but that the landlord or party, to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available.

If a landlord distrain for rent before his tenant's arrest, though the distress be not sold, or removed until after the vesting order(*g*), such landlord has a right to apply the whole proceeds of the goods, when sold, in discharge of the rent due to him at the time of distraining, and is not restricted to the recovery of one year's rent.

51. Landlords being deprived, by the common law, of their remedy by distress, where the tenant's goods are taken under legal process, it is enacted by the Irish Statute(*h*) 9 Anne, c. 8, that no goods or chattels whatsoever, lying or being in or upon messuages, lands, or tenements, which are, or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution or foreign(*i*) attachment(*j*), *justicies* or *distringas*, on any pretence whatsoever, unless the party at whose suit such execution, or foreign attachment, *justicies*, or *distringas* is sued out, before the removal of such goods from off the premises by virtue of such execution, or extent, foreign attachment, or *distringas*, pay to the landlord of the premises, or his bailiff, all such sums of money as are or shall be due for rent for such premises, at the time of taking such goods and chattels, by virtue of such foreign attachment, execution, extent, *justicies*, or *distringas*, provided such arrears of rent do not amount to more than one year's rent: and in case such arrear shall exceed one year's rent, then the party at whose suit such execution, or foreign attachment, *justicies*, or *distringas*, is sued out, paying the landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of the Act, and the sheriff, or other officer, is empowered and required to levy and pay to the plaintiffs the monies so paid for rent: provided(*k*) such landlord, or his agent, do make and produce an affidavit in writing (if thereto required by the plaintiff in such action, or execution, or his agent) that such arrear of rent is

(*g*) *Wray v. Lord Egremont*, 4 B. & Adol. 122; 1 Nev. & M. 188, S. C.

(*h*) 9 Anne, c. 8, s. 1, Irish; 8 Anne, c. 14, s. 1, English.

(*i*) The English Act does not mention writs of foreign attachment, *justicies*, or *distringas*.

(*j*) The writ of *justicies* is in nature of a commission enabling the sheriff to

hold a plea of debt in his county Court, above the value of forty shillings, and seems to have been taken away by the Irish Act, 36 Geo. III. c. 39, which restrains the jurisdiction of the Irish county Courts to replevin suits.

(*k*) 9 Anne, c. 2, s. 8, Irish; there is no similar provision in the English Statute.

really and *bond fide* due to such landlord or lessor, saving however the rights of the Crown.

52. The object of the Statute was to afford a remedy for one year's rent to the landlord(*l*) out of whatever chattels should be found on the demised premises, which might have been distrained by him, if the execution had not intervened, and the sheriff is answerable to the landlord in case of his neglecting(*m*) to carry the provisions of the Act into effect. A strict construction was formerly given to this Statute, by requiring that the sheriff should receive(*n*) notice from the landlord of the rent in arrear being due to him, before the removal of the property. It is now established to be the sheriff's duty to retain a year's rent out of the proceeds of a tenant's goods taken in execution, provided notice be given(*o*) at any time while the goods are unsold, or the produce of their sale remains unapplied: and the sheriff was ordered, on motion, to satisfy the landlord's claim for a year's rent, although the goods had been removed from the premises before the sheriff had got notice of the rent being in arrear. If the sheriff has no reason to suppose any rent to be due out of the premises, he will be protected in paying over the money levied to the execution creditor; but if the sheriff, before he parts with the money, become, by any means, acquainted with the fact that rent is due to the landlord, though no express notice be given, he will be liable: where goods were removed and sold under an execution between the fifth and the tenth(*q*) days of January, and no specific notice was given until the 17th day of January, on the landlord's behalf of any rent being in arrear: upon its being proved that the sale was conducted with secrecy and despatch, a question was left to the jury whether the sheriff knew that rent was in arrear, although no notice of the fact had been given to him before the sale: after verdict for the landlord, upon motion for a new trial, it was ruled that notice to the sheriff was only required for the purpose of establishing, beyond doubt, his knowledge of the landlord's claim, and if that knowledge be brought home to him, by any other means, before he has parted with the proceeds, he shall be liable.

By the Irish Statute(*r*) the plaintiff in the execution, or his

(*l*) *Duck v. Braddyll*, M'Cl. 217; 13 Price, 455.

(*m*) *Palgrave v. Wyndham*, 1 Stra. 212; *Pain v. Womansell*, 7 Mod. 557.

(*n*) *Smith v. Russell*, 3 Taunt. 400. *Waring v. Dewberry*, 1 Stra. 97; Lord Tenterden said, he had looked into the record of *Palgrave v. Wyndham*, and

found that notice was in fact given to the sheriff; *Lane v. Crockett*, 7 Price, 561.

(*o*) *Arnitt v. Garnett*, 3 B. & Ald. 440.

(*q*) *Andrews v. Dixon*, 3 B. & Ald. 646.

(*r*) 9 Anne, c. 8, s. 2 Irish.

agent, may require the landlord, or his agent, to make and produce an affidavit in writing, that the arrear of rent claimed is really and *bonâ fide* due to the landlord: and it is customary in Ireland for the landlord, or his agent, to lodge with the sheriff an affidavit stating the amount of the rent claimed, the period at which it became payable, and that the sum claimed is really and *bonâ fide* due: if the landlord refuse to verify his demand as required by the Act, after application made to the creditor for that purpose, the sheriff may disregard the claim. No particular or specific form of notice is required by the Statute, and it has been ruled that a notice(s) stating a year's rent to be due to the landlord, and the mortgagees of his estate, is sufficient to put the sheriff on his guard: if the sheriff get notice, or is aware of rent being in arrear out of demised premises, he must, in the first instance, levy(t) for the rent, and then for the execution, and is not warranted in removing any of the goods from the lands until the landlord's rent be satisfied: after a claim made for rent, if the sheriff sell the tenant's goods for a less sum than the amount claimed, and suffer them to be removed, he will be answerable for the whole sum demanded by the landlord, not exceeding(u) a full year's rent, and though the sheriff bring back the cattle which were so seized and removed, he will continue liable to the landlord for his rent, because the cattle were protected against the landlord's distress, while they remained in custody of the law.

53. The sheriff is not bound to seize goods under an execution, unless the party at whose suit it issues shall pay the landlord(v) such sum as was then due to him, not exceeding a year's rent of the premises on which the goods were taken before the removal of the property, and if the party refuse to do so, the sheriff may either return *nulla bona*, or may state the facts specially: in an action against a sheriff for removing goods without satisfying a year's rent, an application(w) was made to stay further proceedings, on paying over to the landlord the proceeds of the sale, but the motion was refused with costs, because it was competent for the landlord, on the trial of the cause, to shew that the goods would have produced sufficient to discharge the year's rent, if the sale had been carefully managed: however, a bill of sale, given by the sheriff to the execution creditor, of goods seized on

(s) *Colyer v. Speer*, 2 Brod. & B. 67; 4 Moore, 473.

(t) *Colyer v. Speer*, 2 Bro. & B. 57; 4 Moore, 473.

(u) *Lane v. Crockett*, 7 Price, 566.

(v) *Calvert v. Jolliffe*, 2 B. & Adol.

418; *Buckley v. Woodmason*, 1 Huds. & Br. 101; *Needham v. Kelly*, 3 Irish Law Rep. 181.

(w) *Foster v. Hilton*, 1 Dowl. Pr. Ca. 35; *Groombridge v. Fletcher*, 2 Dowl. Pr. Ca. 353.

demised premises(*x*), does not constitute a constructive removal, to render the sheriff liable to an action on the case at the suit of the landlord, for not paying over half a year's rent.

A sheriff having levied an execution on goods, which were not the debtor's property(*y*), the owner of the goods recovered by action against the sheriff the whole proceeds of the levy: the sheriff having got the goods before the removal of the goods, of a year's rent being in arrear, he is held answerable for the rent under the Statute, though he had not been obliged to pay the entire proceeds of the levy to the owner of the goods because the landlord was deprived of his remedy by distress: however, if the landlord apply by motion to compel the sheriff to pay a year's rent, a reference will be directed(*z*), to take an account of the goods seized under the execution, and what they produced, and the sheriff will be ordered to pay the amount, after just allowances, to the landlord, not exceeding a year's rent. The sheriff having seized, under an execution, a tenant's goods, the proceeds of which were exhausted by payment of a year's rent to the landlord, of the expenses of the execution, and in part satisfaction of a prior execution against the same debtor, it was ruled that a return of *nulla bona* to a second execution was proper. If a landlord, or his agent, accept an undertaking from the sheriff's officers for a year's rent, and then consent that the goods shall be sold by such conduct(*b*) he waives his remedy under the Statute, in case the rent be not paid, and will be obliged to have recourse to an action on the undertaking. Upon the trial of an action against a sheriff for not paying over a year's rent on an execution against a tenant, in order to render(*c*) the tenant a competent witness, the landlord released from all rent due out of the premises, and it was ruled that the release, which had become necessary in consequence of the sheriff's misconduct, should not be suffered to prejudice the landlord in his proceeding against the sheriff.

The claim for a year's rent, under the Statute, is confined to the landlord, and if he be in fact paid, no other person(*d*) can have a right to stand in his place; for if a person, out of motives of kindness, pay the amount of a bill of exchange, which was passed by the tenant

(*x*) *Smallman v. Pollard*, 8 Jurist, 246; C. B.

(*y*) *Forster v. Cookson*, 1 Gale & Dav. 58; 1 Q. B. Rep. 419; *Ryan v. Daly*, 2 Jones's Exch. Rep. 299.

(*z*) *Henchett v. Kimpson*, 2 Wils. 141; *Foster v. Hilton*, 1 Dowl. Pr. Ca. 35.

(*a*) *Wintle v. Freeman*, 11 Ad. & Ell.

539; 1 G. & Dav. 93.

(*b*) *Rothery v. Wood*, 3 Camp. P. C. 24.

(*c*) *Thurgood v. Robinson*, 7 429; 5 Moo. & P. 266; 4 Carr. 481.

(*d*) *Wright v. Lett*, 2 Huds. 544.

to his landlord for a half-year's rent, neither the party paying the bill, nor the landlord, can compel the sheriff to repay such half-year's rent under an execution against the tenant's goods. The personal representatives of a landlord are entitled to the benefit of the Statute for recovery of a year's rent(*e*), which accrued due in the life-time of the deceased, but where the tenant's goods were taken in execution after the decease of a landlord, who died intestate, and letters of administration of his effects were not obtained until after the sale and removal of the goods, it was ruled(*f*) that the sheriff was not obliged to retain a year's rent, as there was no person qualified to demand payment. If two years' rent be in arrear, and the landlord receive one year's rent out of the money levied by execution against the tenant's goods, he is not entitled to demand(*g*) payment of the other year's rent out of the proceeds of a subsequent execution against the tenant, because it was only intended by the Statute to give the landlord a lien to the extent of one year's rent out of the premises.

54. The landlord has only a right to rent due at the time of the seizure of a tenant's goods under an execution, and is not entitled to any rent which accrues due after the taking, and during the continuance of the sheriff in possession: the sheriff having seized a tenant's goods on the 11th of June, in consequence of some arrangement between the parties, retained possession(*h*) until the 2nd of November, when they were sold, and it was decided that the landlord could only recover from the sheriff the rent due at the time of the original seizure, and if the sheriff remained on the demised premises, beyond a reasonable time, so as to prejudice the landlord's rights, the remedy was by action on the case for such injury. Corn in the blade being sold, under an execution by the sheriff, before the rent fell due, it was ruled(*i*) he was not answerable for any rent accruing due after the sale, and while the corn remained in the ground, because goods taken in execution virtually remain in custody of the law, until they are capable of being delivered by the sheriff, so as to give effect to the judgement.

A sheriff being required to retain £450 for a year's rent, out of the proceeds of an execution against a tenant's goods(*j*), and having refused to retain more than £360, on an allegation that the rent had been

(*e*) *Palgrave v. Windham*, 1 Stra. 212.

(*f*) *Waring v. Dewberry*, 1 Stra. 97.

(*g*) *Dod v. Saxby*, 2 Stra. 1024.

(*h*) *Hoskins v. Knight*, 1 M. & Selw. 247; *Gwilliam v. Barker*, 1 Price, 274; *The King v. Hill*, 6 Price, 19.

(*i*) *Peacock v. Purvis*, 2 Brod. & B.

362; 5 Moore, 79; *Wright v. Dewes*, 3 Nev. & M. 790; 1 Ad. & Ell. 641; *Eaton v. Southby*, Willes, 131; and see *Parslow v. Cripps*, 1 Com. Rep. 204.

(*j*) *Williams v. Lewsey*, 8 Bing. 28; 1 Moo. & Sc. 92.

abated by the landlord to that sum, upon motion to compel the sheriff to pay over the full year's rent, it appeared that the landlord had made a voluntary reduction in the tenant's rent, but always considered himself entitled to demand the full amount, the Court held that he was not bound to make an abatement to his tenant's creditors, because he had chosen to make an abatement to the tenant himself, and the application was granted.

A party having contracted for the sale of a house, at a specific sum, subject to a stipulation, that until an assignment should be made the intended purchaser should pay at the rate of £100 yearly from the time(*k*) of taking possession until the completion of the sale, and the vendor agreed to make certain improvements in the meantime: the intended purchaser having entered, and a half-yearly payment having become due, it was ruled that the sheriff, who had seized the goods of the occupier under an execution, was bound to pay over such half-yearly sum, which was in the nature of rent, to the vendor, and that the agreement for further improvements could not vary the rent, and merely gave a right to maintain a cross action for its non-performance.

55. The right to demand a year's rent under the Statute, is confined to the immediate landlord, and only extends to cases in which there is a tenancy(*l*) actually subsisting at the time of the seizure under the execution. Goods and growing crops being seized by the sheriff on the 1st of July, 1816, under an execution, the landlord claimed a year's rent, and having obtained judgement in ejectment for recovery of possession of the premises, grounded on a demise laid on the 5th of December, 1815, a writ of *habere* was afterwards, on the 10th of July, 1816, delivered to the sheriff: and it was decided(*m*) that the sheriff was not bound to sell the growing crops, as they could not be considered the tenant's property, because after judgement in ejectment, the tenant was to be deemed a trespasser, by relation to the day of the demise, and the Court held that the landlord was not entitled to his claim for a year's rent out of the goods which had been sold, because the effect of the judgement was to determine the holding on the day of the demise, and from thenceforward there was no subsisting tenancy upon which the Statute could attach.

In order to maintain this action against the sheriff, it must app

(*k*) *Saunders v. Musgrave*, 6 B. & Cress. 524; 9 D. & Ry. 549.

(*l*) *Master Bennett's case*, 2 Stra. 787.

(*m*) *Hodgson v. Gascoigne*, 5 B. Ald. 88.

that the premises were holden at a rent certain, and where the tenant entered under an executory agreement for a lease made in October, 1829, but no lease was executed, and the tenant continued in the occupation until the time of the execution in February, 1842, and no rent was proved to have been paid in the meantime, it was ruled(*n*) that an actual payment of rent, or something equivalent to payment, should be shewn, from which a yearly tenancy might be inferred, and it must also appear that the tenant had possession of the same subject matter comprised in the contract. In Ireland a landlord may distrain lands holden under an executory contract for a lease, before any payment made by the tenant, and it would probably be considered that the sheriff would be bound, under such a holding, to satisfy a year's rent out of the proceeds of the sale of the tenant's goods under an execution.

56. The Statute only applies to executions at the suit of a third person, and not to those at the landlord's suit, for if a landlord, who gets a judgement against his tenant, and issues execution against his goods, were to be allowed a year's rent out of the proceeds of the execution(*o*), the tenant might, by such means, be deprived of his remedy by replevin, and of the benefit of those Statutes which were passed to protect him against irregularities in distress. The English Statute(*p*) is restrained in its operation to executions founded upon judgements, and to extents at the suit of private persons under Statutes staple, but the Irish Statute(*q*) is extended by express words to a *distringas* and foreign attachment, and, therefore, applies not only to writs of *fieri facias* and extents under Statutes staple, but to the seizure(*r*) of goods by *distringas*, or mesne process issuing out of any Court of justice. The Statute extends to goods taken in execution at the suit of a defendant(*s*), for the recovery of the costs of a nonsuit or other proceedings. Under a sequestration issued by a Court of Equity against a tenant's interest, the landlord is entitled to be paid all arrears, not exceeding one year's rent(*t*), due to him at the time of the seizure, and is also entitled to be paid all rent subsequently accruing due while the sequestrators continue in possession. A receiver appointed by a Court of Equity is competent(*u*) to demand payment of a year's rent from the sheriff under the Statute.

(*n*) *Riseley v. Ryle*, 11 Mees. & W. 16.

(*o*) *Taylor v. Lanyon*, 6 Bing. 536; 4 Moo. & P. 316; and see *Lee v. Lopez*, 15 East, 230.

(*p*) 8 Anne, c. 14, s. 1, Eng.; *The King v. De Caux*, 2 Price, 17.

(*q*) 9 Anne, c. 8, s. 1, Irish.

(*r*) *Brandling v. Barrington*. 6 B. & Cress. 467; 9 D. & Ry. 609.

(*s*) *Henchett v. Kimpson*, 2 Wils. 140.

(*t*) *Dixon v. Smith*, 1 Swanst. 457.

(*u*) *Crawford v. Hassard*, Smith & B. 269.

An action of debt, or on the case, may be maintained by a tenant against the plaintiff in a civil bill decree for taking goods in execution and removing them from demised premises(*v*), after notice of the landlord's claim for rent, without satisfying his demand : a civil bill is a legal judgement, and the word "execution" is a general term used throughout the Civil Bill Acts, and by the Statute(*w*) 2 Geo. the liability of the sheriff in the execution of civil bill decrees is transferred to the plaintiff in the civil bill, and it is immaterial if the goods seized on demised premises are the property of the tenant or a third person, as the injury done to the landlord is the same.

Rent reserved, payable in advance, may be enforced either by distress, or, in case of a levy by execution on demised premises(*x*), the sheriff is answerable for a year's rent to the landlord : the sheriff is bound to pay the year's rent to the landlord(*y*), without making any deduction for poundage : the landlord's remedy for removing a tenant's goods under an execution without paying a year's rent, is by action(*z*) of debt or on the case against the sheriff, or by action of debt or on the case(*a*) against the execution creditor, but an action for money(*b*) had and received by the sheriff to the landlord's use cannot be sustained.

It has been held that a landlord was entitled to the remedy provided by the Statute for a year's rent, when the tenant's goods were taken under an outlawry(*c*) at the suit of a subject, but the Courts at present seem inclined to construe the Statute more strictly(*d*), and though they may interpose, by giving the landlord a sort of equitable relief where the fund is under their control, yet they will not treat the sheriff as a wrong-doer, and expose him to an action, where he has fairly acted in the directions of the Act.

57. The rights of the Crown are expressly saved by the Statute, and its provisions do not affect any prerogative process operating to the benefit of the Crown(*f*), such as extents in chief, or in aid of *levari* or of outlawry, and the word "extent" which is int

(*v*) *Ryan v. Daly*, 2 Jones, 299; *Hawkes v. Smith*, Sausse & Sc. 712; *Hayes v. M'Clure*, 2 Crawf. & D. 476; and see *Riseley v. Ryle*, 1 Mees. & W. 16.

(*w*) 2 Geo. I. c. 11, Irish.

(*x*) *Harrison v. Barry*, 7 Price, 690; *Buckley v. Taylor*, 2 T. R. 600; *Charters v. Sherrock*, Alc. & Nap. 17.

(*y*) *Gore v. Gofton*, 1 Stra. 643.

(*z*) *Riseley v. Ryle*, 11 Mees. & W. 16.

(*a*) *Ryan v. Daly*, 2 Jones's Exch. Rep. 299.

(*b*) *Green v. Austin*, 3 Campb. N. P.

Ca. 260.

(*c*) *Greaves v. D'Acastro*, Bl. St. John's College v. Murcott, 264.

(*d*) *Brandling v. Barrington*, Cr. 475; 9 D. & Ry. 609; *Lopez*, 15 East, 230.

(*e*) 9 Anne, c. 8, s. 8, Irish; c. 14, s. 8, English.

(*f*) *Giles v. Grover*, 6 Blig. Ca. 277; 1 Cla. & Fin. 72; 293; *The King v. De Caux*, 2 F. Rex v. Southerby, Bunb. 5.

into the first clause of the Act, applies only to extents of a private nature, or upon Statutes staple. Where goods were distrained for rent, and before sale were seized under an extent at the suit of the Crown, it was determined(*g*), after much consideration, that the execution of the Crown was entitled to precedence, and over-reached the distress, because goods distrained for rent remain in custody of the law, and the property in them is not altered before sale, but the goods of the Crown debtor are bound by the extent from its *teste*. After a distress made by a landlord, the tenant's goods were seized and sold under an extent by the Crown, and though the extent was satisfied, yet the Court were unable(*h*) to authorize the landlord to make use of the crown-process against other property belonging to the debtor.

(*g*) *The King v. Cotton*; 2 Vez. Sen. 288; Park. Rep. 112, S. C.; *The King*

v. Hodder, 4 Price, 317.

(*h*) *The King v. Hodder*, 4 Price, 312.

CHAPTER III.

DISTRESS.

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| <p>58. <i>Distress for Rent at common Law, must be made on demised Premises.</i></p> <p>59. <i>Outer Door cannot be forced for the Purpose of distraining.</i></p> <p>60. <i>Crown Lands not subject to Distress.</i></p> <p>61. <i>Waiver of Right to distrain.</i></p> <p>62. <i>What Acts constitute a Taking by Distress.</i></p> <p>63. <i>Particular of Distress.</i></p> <p>64. <i>How Chattels are to be impounded.</i></p> <p>65. <i>May be impounded on demised Premises.</i></p> <p>66. <i>Cannot be lawfully removed out of the County where seized.</i></p> <p>67. <i>Not to be used or worked by Distrainor.</i></p> <p>68. <i>Statutes authorizing Sale of Distresses.</i></p> | <p>69. <i>At what Time Chattels dist should be sold.</i></p> <p>70. <i>Goods wrongfully distrained.</i></p> <p>71. <i>Party abusing Authority of Law, becomes a Trespasser.</i></p> <p>72. <i>But not where the Authority is by the Act of another.</i></p> <p>73. <i>Distrainor not a Trespasser sequent Nonfeasance.</i></p> <p>74. <i>Effect of English Statute Geo. II. c. 19, as to Irregularity in distraining.</i></p> <p>75. <i>What Irregularities render distrainor a Trespasser.</i></p> <p>76. <i>Waiver of Irregularity in the conduct of a Distress.</i></p> <p>77. <i>Excessive Distress.</i></p> <p>78. <i>Justification by Landlord upon general Issue.</i></p> <p>79. <i>Pound Breach and Rescue.</i></p> |
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58. A LANDLORD, by the common law, is entitled to distrain upon any part(a) of the demised premises out of which the rent is made payable, and where rent is reserved out of lands which are demised by several wards let amongst several undertenants(b), a distress may be made by the original lessor upon any undertenant for the whole rent. If lands situated in different counties(c) are demised at an entire lease, a landlord may distrain for the whole rent in arrear upon the premises situated in any one county; but if two tenements be demised by several demises, reserving(d) separate rents, although comprised in one lease, a joint distress cannot be supported, because each tenant is only liable to its separate rent. A wharf being demised with land and load goods, together with all easements and appurtenances thereunto belonging, it was decided(e), that the lessor had no right to distrain a barge lying opposite to, and attached by ropes to the wharf.

(a) Year Book, 9 Hen. VI. fo. 9, pl. 123; 1 Ro. Abr. 671; Distress, M. pl. 3.

(b) 1 Ro. Abr. 671; Distress, M. pl. 12.

(c) Walker v. Rumbald, 12 Mod. 76; Comb. 336; 1 Ld. Raym. 53, S. C.

(d) Rogers v. Birkmire, C. B. 1040, S. C. 245; 2 Stra. 1040, S. C. 141.

(e) Buzzard v. Capel, 8 B. & C. 141; 2 M. & Ry. 197; 6 Bing. Moo. & P. 480; 4 Bing. 137; 339; 3 Younge & Jerv. 344, S. C.

because a distress can only be lawfully made on land out of which the rent issues, and the rent did not issue out of the land between high and low water-mark, in which the tenant only had an easement, as appurtenant to the wharf.

The Statute of Marlbridge(*f*), in affirmance of the common law, enacted, that no man should, for any manner of cause, take distresses out of his fee, nor in the King's highway, nor in the common street, except the King or his officers having special authority to do so. A distress, therefore, cannot be lawfully taken in any highway(*g*), although comprised within the limits of the demised premises; but if the landlord or his bailiff, coming to distrain for rent, see cattle upon the land which are driven upon the highway, or into any other place, before a distress can be made, the landlord or his bailiff, upon fresh pursuit, may seize them in the highway, or elsewhere. However, if a landlord distrain for rent, and the tenant replevy, it is no answer to the avowry, that the distress was taken(*h*) in the highway, the tenant's remedy in such case being by action on the Statute, or for the trespass. If the landlord or his bailiff, coming to distrain for rent, do not see the cattle on the demised premises(*i*), though the tenant purposely remove them to avoid distress, or if the cattle, of their own accord, leave the land; or if the tenant, after the landlord had seen the cattle on the premises, remove them for any other cause than to deprive the lord of his distress, in such cases, by the common law, the cattle were not distrainable. Cattle trespassing upon land are only liable to distress while they are actually damage *feasant*, although they be driven off purposely to prevent them from being distrained(*j*), and within view of the bailiff coming to seize them; but if the cattle were trespassing when the owner of the land or his bailiff actually entered the field for the purpose of distraining, they may be(*k*) pursued and seized for the damage done; if, however, the cattle got out of the field before the bailiff had entered into it, a subsequent distress cannot be justified.

By the Irish Statute(*l*), 15 Geo. II. c. 8, any lessor, landlord, or grantee of a rent-charge, is authorized to distrain for rent any cattle or stock of their respective tenants feeding upon any common appurtenant,

(*f*) 52 Hen. III. c. 15, English and Irish.

(*g*) 2 Instit. 131.

(*h*) 2 Instit. 131; Woodcroft *v.* Thompson, 3 Lev. 48.

(*i*) Co. Litt. 161, A.; John's case, Year Book, 44 Edw. III. fo. 20, pl. 18; Poole *v.* Longueville, 2 Saund. 284, note 2.

(*j*) Year Book, 16 Edw. IV. fo. 10, by Brian, Ch. J., Co. Litt. 161, A.; 2 Instit. 131; but see the Irish Statute 7 Geo. IV. c. 42, *ante*, page 709.

(*k*) Clement *v.* Milner, 3 Espin. N. P. C. 95, by Lord Eldon, Ch. J.

(*l*) 15 Geo. II. c. 8, s. 5, Irish; 11 Geo. II. c. 19, s. 8, English.

or any ways belonging to all or any part of the premises demised, as to sell the same, in such manner as if such goods and chattels had actually been distrained upon the premises for such arrears of rent. The ways referred to in this Act mean private roads, over which a tenant has a right of passage in respect of his farm, and do not include a road made or repaired at the public expense, for the public benefit.

59. A distress for rent may be taken in a house upon demised premises, if the outer door be open, or if the outer door(*m*) of the house be fastened, the landlord or his bailiff may enter through an open window; but neither an outer door, nor a window can lawfully be broken open for the purpose of distraining. If the landlord or his bailiff procure admittance into the house, he may justify(*n*) forcing open an inner door; and if a house be hired out in separate apartments, and the outer or hall-door is common(*o*) to all the occupiers, and access is gained through such outer door, any of the inner doors may be broken for the purpose of effecting, or of completing a distress; but if the apartments be arranged and let like chambers in the Inns of Court, with a distinct outer door to each set of apartments, they are deemed separate houses, and every such outer door will be privileged. A landlord is not warranted in forcing(*p*) open gates, or breaking down enclosures for the purpose of taking a distress; but where a landlord occupied an apartment over a mill(*q*), which had been demised, it was ruled that he might raise the boards of his own floor, and obtain entrance through the aperture, in order to levy his rent by distress, without committing a trespass. A party having lawfully commenced a distress for rent in a dwelling-house, was forcibly expelled, and in about an hour afterwards, having returned with assistance, and being refused admittance, broke open(*r*) the outer door, and completed his seizure: in an action for the trespass, it was ruled that the defendant was justified in regaining possession by force, and resuming the distress which had been interrupted by violence: but where a bailiff, who was left in possession of property distrained for rent, after remaining for two days quitted the place in great excitement, it was ruled(*s*), that after a lapse of six days the landlord had no right to break open the house, and retake the goods.

(*m*) 1 Ro. Abr. 671; Distress, M. pl. 1, 7.

(*n*) Comb. 17; Browning v. Dann, Cases temp. Hard. 167.

(*o*) Lee v. Gansel, 1 Cowp. 1.

(*p*) Co. Litt. 161, A.; Rich v. Woolley, 7 Bing. 651-661; 5 Moo. & P. 663; Vin. Abr. Distress, E. 2.

(*q*) Gould v. Bradstock, 4 Taur. 562.

(*r*) Francombe v. Pinche, 1 Espi. law of Nisi Prius, 396; Eagleton v. Gutteridge, 11 Mees. & W. 465.

(*s*) Russell v. Rider, 6 Carr. & 416.

60. The Queen, by reason of her royal prerogative, may distrain for rent, not only on the lands out of which it is reserved or granted, but upon any lands(*t*) belonging to her tenants, though holden of other lords, and not made expressly subject to, or chargeable with, the payment of such rent.

A distress cannot be maintained(*u*) upon the possession of the Sovereign, nor upon lands holden in trust(*v*) for the Crown. A distress for tithe composition(*w*) cannot be taken upon lands held by the principal officers of the Ordnance, in trust for public purposes; nor can grand-jury, or county rates, be levied by distress on cattle(*x*) grazing in the Phoenix-park, near Dublin.

61. If a landlord, or his steward, be privy to the sale by a tenant of a crop of grass growing on his farm, and receive the price from the purchaser in part payment of rent then due(*y*) out of the premises, the purchaser's cattle, while feeding on the *eatage*, are not liable to distress for the residue of the rent due to the landlord; and such an arrangement operates as a suspension of any right to distrain for the residue of the rent remaining unpaid at the time of the sale: but if part of a farm be sub-demised, and an agreement be made that the rent payable by the underlessee(*z*) shall be applied in discharge of the rent payable by the immediate lessee to the landlord, a waiver of the landlord's right to distrain upon the undertenant cannot be inferred from such an agreement.

62. No particular form is required in commencing a distress for rent, provided the landlord, or his bailiff, manifest a clear intention of placing the goods *in custody of the law*, and it is necessary for that purpose either to put the goods under the care of a keeper or bailiff, or to remove them from the demised premises. A landlord to whom rent was due, hearing his tenant and a third person disputing about the property in a lathe which was on the demised premises, laid his hand on the machine(*a*), and said he would not suffer it to be removed from the premises until his rent was paid. The lathe having been carried away by such third person, was brought back by the landlord's order,

(*t*) 2 Instit. 132; Sir John Dalby's case, Year Book, 44 Edw. III. fo. 45.

(*u*) Doe dem. Legh v. Roe, 8 Mees. & W. 579; Bro. Abr. Distress, pl. 46; Vin. Abr. Distress, D. 3.

(*v*) Meade v. Warburton, Alc. & Nap. 287; Roe v. Darley, 1 H. & Br. 442; Lord Amherst v. Lord Somers, 2 T. R. 372.

(*w*) Meade v. Warburton, Alc. & Nap. 287.

(*x*) Gibbons v. Moran, 6 Law Rec. 141, 2nd Ser.

(*y*) Horsford v. Webster, 1 Cro. M. & R. 696; 5 Tyrw. 409, S. C.

(*z*) Horsford v. Webster, 1 Cro. M. & Rosc. 702, by Parke, Baron, 5 Tyrw. 414; Welsh v. Rose, 6 Bing. 638; 4 Moo. & P. 484, S. C.

(*a*) Wood v. Nunn, 5 Bing. 10; 2 Moo. & P. 27; Knowles v. Blake, 5 Bing. 499, 3 Moo. & P. 314.

and it was ruled in an action of trover for the lathe, that the distress had been sufficiently commenced by the landlord's act, to entitle him to retake the lathe. So a landlord, or his agent, giving notice of an intention to distrain(*b*), and then walking round the demised premises, and serving a written notice of the seizure, though a bailiff was not left in charge of the goods, yet as between *landlord and tenant*, the distraining was deemed sufficient to entitle the tenant to maintain an action for an excessive distress. Upon the bailiff's entry into a dwelling-house for the purpose of distraining, he usually lays hold of some distrainable article, in the name of a distress for the whole, and it is not necessary(*c*) that he should seize every specific chattel; but if the value of the moveable property on the premises considerably exceed the rent in arrear, the bailiff should only seize a sufficient part of the goods to satisfy the rent due, together with the costs of distraining, as the landlord will be answerable in damages for making an excessive distress.

63. By the Statute(*d*) for regulating the proceedings of the Civil Bill Courts in Ireland, it is enacted, that *in all cases* of distresses for rent, the person making any such distress shall deliver to the person in possession of the premises, for the rent of which such distress shall be made, or in case there shall not be any person found in possession, shall affix on some conspicuous part of such premises, a *particular* in writing of the rent demanded, specifying the amount thereof, the time or times when the same accrued, and the person by whom, or by whose authority, such distress is made. Where the yearly rent payable out of the lands exceeds fifty pounds, it is not requisite that any *particular* should be delivered, as the Statute was not meant to extend to, or vary(*e*) the procedure of the superior Courts in replevin suits: the chief object of the notice is to apprise the tenant, who must be made parties to the suit, and whether the rent claimed warrants him in issuing a civil bill replevin: but if the tenant proceeds in the superior Court, although the reserved rent be less than £50 yearly, the general law takes its course, and the plaintiff stands in the same situation as any other suitor: and even if the Statute were to be considered mandatory in *all cases*, and the landlord should not comply with its terms by furnishing a particular of the rent, he cannot be

(*b*) *Swann v. Ld. Falmouth*, 8 B. & Cress. 456; 2 Mann & Ry. 534; *Hutchins v. Scott*, 2 Mees. & W. 809; and see *Hartley v. Moxham*, 3 Gale & Dav. 1; 3 Q. B. Rep. 701; Car. & M. 504.

(*c*) *Dod v. Monger*, 6 Mod. 215.

(*d*) 6 & 7 Will. IV. c. 75, s. 6, Irish.

(*e*) *Daly v. Lord Bloomfield*, 5 Irish Law Rep. 65; *M'Creery v. Jackson*, 5 Irish Law Rep. 443; *Carden v. Mahon*, 1 Cr. & D.C. Ca. 489; *Daniel v. Bingham*, 4 Irish Law Rep. 285, which case was affirmed in the Irish Exchequer Chamber; and see *post*, Replevin, 883.

ed as a trespasser(*f*) *ab initio* in consequence of such omission, can only be liable to an action on the case for any injury which the it has sustained by such negligence. A bailiff employed to distress for rent, should deliver to the person in possession of the demised premises, or in case no person shall be found in possession, should post on a conspicuous place on the land, a particular or notice in writing, stating by whose authority the distress is made, the yearly rent, the amount claimed, and the periods when the instalments of rent comprised in the demand respectively accrued, though the omission to deliver a particular does not afford any ground of defence to an avowry for rent in the superior courts. The distress is generally begun by making an inventory of the chattels intended to be taken, and a copy of such inventory should be given to the tenant in possession, along with the notice in writing particular required by the Civil Bill Act, and both of them(*g*) should be delivered on the first day of the bailiff's entry on the premises, or as soon as circumstances will permit.

4. The landlord not having any property in cattle or goods distrained, was obliged by the common law to place them in a pound in conformity of the law: if a distress consist of household goods or furniture, which may be injured by exposure to the weather(*h*), or which may be easily carried away, it is the landlord's duty to impound them in a house or other enclosed place, where they may be safely kept, for if goods be deposited in an open pound, the distrainor will be answerable for any loss or injury which shall be sustained. Cattle ought to be placed in an open pound accessible to their owner, so as to enable him to obtain them by replevin, or to supply them with food, and if removed to a covered pound off the demised premises, they must be kept by the distrainor, who will not be entitled to any remuneration for their sustenance, and if the cattle die in such covered pound, for want of proper care, the party distraining(*i*) will be answerable for the loss: but if cattle happen to be stolen out of a pound *overt*, or escape out of the pound without neglect or other default of the distrainor, he does not incur any liability, and if the cattle should die in the pound, without any fault on the landlord's part, another distress may be made for the same rent. It is imperative on a party distraining to provide a

(f) *Daly v. Lord Bloomfield*, 5 Irish Rep. 65; *Fox v. Lynch*, 1 Cr. & D. 227.

Browne v. Motherwell, 1 Cr. & D. 468; *Orr v. Stevenson*, Irish Circ. Rep. 157; *Murphy v. Butler*, Jebb's Reports, Cases, 320.

(h) Co. Litt. 47, B.; 2 Instit. 106; 1 Ro. Abr. 673, Distress, P.

(i) *Vaspor v. Edwards*, 12 Mod. 648; 1 Salk. 248; 1 Lord Raym. 719; Holt, 256; *Williams v. Price*, 3 B. & Adol. 695; *Butt v. Jordan*, Irish Circ. Rep. 104.

proper pound(*j*) for the distress which he has taken: the law does not allow him to confine the cattle of another person, without seeing that the pound is properly provided for; and if a pound be immersed in water, or otherwise unfit, at the time of impounding a distress, the distrainer is answerable for any damage caused by the improper state of the pound. A landlord ought not to suffer cattle which are confined in a pound to be tied(*k*) or fastened, for if an animal be strangled or otherwise injured by means of such fastening, the party distraining is liable to make satisfaction: and if a horse be placed in a pound protected by spikes, and wound(*l*) himself upon them, the distrainer will be responsible for the injury, because he ought to see that the pound is safe and proper.

By the Irish Statute(*m*) 6 Geo. IV. c. 43, s. 4, it is enacted, that it shall be lawful for magistrates assembled at the Michaelmas Quarter Sessions in their respective districts, to fix the rate or price which it shall be lawful for pound-keepers to receive for sustenance of the cattle, of whatever description, which shall be committed to their pounds, in case the owner of such cattle should not feed them himself, which rate or price, so fixed by such magistrates, shall constantly be and remain posted in legible characters, either on the outside of the dwelling-house, or on the outside of the pound of every such pound-keeper; and that every pound-keeper who shall not keep such rate so continually posted, or who shall charge any greater sum or rate for the sustenance of any such cattle, than the rate fixed by such magistrates, shall forfeit and pay any sum not exceeding five pounds, for each and every month that he shall so act as pound-keeper without having such rate affixed.

65. A distress for rent at common law, could not be impounded(*n*) upon any part of the demised premises, but by the Statute(*o*) 15 Geo. II. c. 8, s. 6, it is enacted, that it shall be lawful for any person lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress: and to appraise, sell, and dispose of the same upon the premises.

(*j*) *Wilder v. Speer*, 3 Nev. & P. 660.
536; 8 Ad. & Ell. 547, S. C.

(*k*) 6 Geo. IV. c. 43, s. 4, Irish.

(*l*) 1 Ro. Abr. 673; *Distress*, P. pl. 7; Bro. Abr. *Trespass*, pl. 250.

(*m*) *Vaspor v. Edwards*, 12 Mod.

(*n*) Year Book, 21 Hen. VII. fo. 3; pl. 55; *Griffin v. Scott*, 2 Lord Rayn.

1424.

(*o*) 15 Geo. II. c. 8, s. 6, Irish; 1 Geo. II. c. 19, s. 10, English.

inner and under the like directions and restraints as any person; a distress for rent might then^d do, off the premises : and that it is lawful for any person or persons to come and go to and from any place or part of the premises where any distress for rent is impounded and secured, in order to view, appraise, and buy, and in order to carry off or remove the same on account of the distress thereof.

If impounded in a dwelling-house under this Statute, ought to be packed together and put into one room(^p), and the bailiff either may keep possession of that room, or should remove the goods from the house, but though this is the strict rule on the subject, very much lenience is sufficient to show that the tenant consented that the goods should remain undisturbed, being for his benefit it should be so moved.

By Statute(^r) 7 Will. III. c. 22, it is enacted, that it shall be lawful for any person having rent arrear and due upon any lease, demise or contract, to seize and secure any sheaves or cocks of corn, or any corn or in the straw, or hay lying or being in any barn or granary upon any hovel, stack, or rick, or otherwise upon any part of the premises charged with such rent, and to lock up or distrain the same in any place where the same shall be found, for or in the nature of a distress, provided that such corn, grain, or hay so distrained be not removed by the person so distraining, to the damage of the owner thereof, but be kept in the place where the same shall be found, but be kept there as long as the owner shall desire until replevied or sold. And by Statute(^s) 56 Geo. III.

it is enacted, that it shall be lawful for every landlord to take and distrain for arrears of rent, all sorts of corn and grass, hops, and pulse or other product which shall be growing on any part of the premises demised, as a distress : and the same to cut, gather, make, and lay up, *when ripe*, in the barns or other proper place on the premises so demised : and in case there shall be no barn or proper place on the premises then in any other barn or proper place the landlord shall hire or otherwise procure for that purpose, and as may be to the premises, and dispose of the same towards satisfaction of the rent for which such distress shall have been taken, and the charges of such distress and sale, in the same manner as any chattels distrained for non-payment of rent. Cattle being

iborn v. Black, 11 East, 405,

(^r) 7 Will. III. c. 22, s. 4, Irish ; 2 Will. & M. s. 1, c. 5, s. 3, English.

iborn v. Black, 11 East, 405,

(^s) 56 Geo. III. c. 88, s. 15, Irish, 11 Geo. II. c. 19, s. 8, English.

distrained on Monday the 30th of September, for half a year's rent which had accrued due on the preceding Sunday(*t*), an inventory of the articles taken was then delivered; on the following morning at 10 o'clock, the first of October, a notice was served on the tenant, stating that the several chattels enumerated had been distrained, and were impounded on the demised premises for the sum of £75, being half year's rent due at the preceding Michaelmas, and on the evening of the same day, the rent claimed, and the costs of distraining were tendered and refused, and on the 2nd of October the distress was replied: the Court held that the acts of the party distraining, coupled with the notice, constituted a complete impounding, and that the subsequent tender was made too late.

66. By the Statute of Marlbridge(*u*) it is enacted, that none shall cause any distress he hath taken, to be driven out of the county where it was taken: and by the Irish Statute(*v*) 10 Car. I. Sess. 2, c. 25, it is enacted, that no distress of cattle shall be driven out of the barony where such distress shall be taken, except it be to a pound *overt* within the same county, not above three miles distant from the place where the distress is taken: and that no cattle or other goods taken by way of distress, for any manner of cause, at one time, shall be impounded in several places, whereby the owner of such distress shall be constrained to sue several replevins of such distress so taken at one time: and by the Irish Statute(*w*) 5 & 6 Geo. IV. c. 43, s. 8, it is enacted that all cattle distrained for rent, or to levy the amount of any decree of Court, or for any other matter whatsoever, shall be impounded in the pound *overt* situate next and nearest to the land upon which such cattle shall have been distrained, and within the same barony or county, to be then and there dealt with according to law: and where there shall be a manor-pound appertaining, or reputed to appertain to any particular manor or estate, that all cattle distrained on any land belonging, or reputed to belong to such manor or estate shall be impounded in such manor-pound: and if any cattle(*x*) distrained shall be impounded in any pound contrary to the provisions of this Act, every person so offending shall, upon conviction, be liable to forfeit and pay any sum not exceeding five pounds for each such offence.

A distress cannot lawfully be driven or removed to a pound in

(*t*) *Thomas v. Harries*, 1 Mann & Gr. 695; 1 Scott, N. R. 524; *Firth v. Purvis*, 5 T. R. 432; *Ladd v. Thomas*, 4 P. & Dav. 9; 12 Ad. & Ell. 117.

(*u*) Stat. of Marlbridge, 52 Hen. III. c. 4, English and Irish.

(*v*) 10 Car. I. Sess. 2, c. 25, s. 1, 1 & 2 Phil. & M. c. 12, English.

(*w*) 5 & 6 Geo. IV. c. 43, s. 8, Irish; there is no corresponding English.

(*x*) 5 & 6 Geo. IV. c. 43, s. 10, Irish.

adjoining barony or county, although such pound be the nearest(*y*), and within three miles of the place where the chattels were distrained, unless it be the manor-pound, but where one distress is made for an entire rent(*z*) issuing out of adjoining parcels of land, in separate baronies, or in separate counties, the goods ought only to be impounded in one barony or one county : however, where the holding was situated in one county, and the manor-pound in a different county(*a*), the lord was held to be justified in driving cattle distrained within the limits of the manor in one county, to the manor-pound situate in an adjoining county : neither the Statute of Marlbridge(*b*), nor the subsequent Statutes, make the party distraining(*c*) a trespasser by not complying with their provisions, though he is liable to the statutable penalties.

67. A landlord, or party distraining, has no right to make use of goods, or to work cattle taken as a distress ; but the owner is entitled to any profit which they produce while in custody of the law ; the rule prohibiting the distress from being used by the distrainor, has been carried so far as not to allow raw hides(*d*) to be tanned by a party distraining, in order to preserve them from rotting, nor has the distrainor any right to cause cows to be milked(*e*), as the owner would probably do so, for his own emolument, before the cattle had suffered any material injury : and where a trunk containing valuable articles(*f*) was distrained for rent, the distrainor was adjudged a trespasser *ab initio*, for causing it to be corded in order to prevent damage. By making use of or by working a distress(*g*), the party distraining becomes a trespasser *ab initio*, and subjects himself to damages in an action of trespass.

68. The sale of distresses for rent appears to have been introduced into Ireland at an earlier period than it was permitted in England, for by an Irish Statute(*h*) passed in the 18th year of Edward the Fourth, entitled “ an Act whereby distresses taken for rent may be sold,” it is enacted, that when any lord take any distress, if it be not redeemed within eight days after the taking, it shall be lawful for the lord to

(*y*) Woodcroft *v.* Thompson, 3 Lev. 48; Gimbart *v.* Pelah, 2 Stra. 1272.

(*z*) Walker *v.* Rumbald, 1 Ld. Raym. 53; 12 Mod. 76; 1 Salk. 247; Comberb. 336, S. C.

(*a*) 2 Instit. 106; 2 Dyer, 169, A. pl. 20.

(*b*) 10 Car. I. sess. 2, c. 25, Irish; 1 & 2 Ph. & M. c. 12, English.

(*c*) Woodcroft *v.* Thompson, 3 Lev. 48; Gimbart *v.* Pelah, 2 Stra. 1272; 2 Instit. 131.

(*d*) Duncombe *v.* Reeve, Cro. Eliz. 783.

(*e*) Bagshawe *v.* Galliard, 1 Ro. Abr. 673, Distres, P., pl. 8; Noy, 119; Yelv. 96; Cro. Jac. 147; Chamberlayn's case, 1 Leon. 220; Mores *v.* Conham, Owen. 124.

(*f*) Welsh *v.* Bell, 1 Ventr. 37, cited.

(*g*) Dod *v.* Monger, 6 Mod. 216; Winterbourne *v.* Morgan, 11 East, 395.

(*h*) 18 Edw. IV. c. 1. There is no corresponding English Act.

appraise the distress, by four men of the same lordship: and if he ~~from~~ whom the distress is taken, do not within other eight days pay, ~~or~~ satisfy the rent in arrear, then the lord to take the distress as appraised for his rent, with his damages: and if the distress be better than ~~the~~ the rent with the arrears, the lord to restore the surplus to the tenant; and if the distress be of lesser price than the rent, the tenant to ~~pay~~ the surplus, or be again distrained. Doubts were entertained whether the provisions of the Statute were not confined to cases between ~~very~~ lord and very tenant; and by the Irish Statute(i) 10 & 11 Car. I. c. 7, it is enacted, that it shall be lawful for every person entitled to ~~any~~ rents, duties, or services, for which it shall be lawful for him to ~~d~~ distress, to impound, appraise, sell, and otherwise to use, dispose of, ~~and~~ convert to his or their use, any distresses to be taken for the same, as in case between very lord and very tenant.

The mode of disposing of distresses for rent is now chiefly regulated by the Irish Statute(j) 25 Geo. II. c. 13, which enacts, that all distresses lawfully taken for any rent-services, fee-farm rents, or ~~rent~~ charges, shall, unless redeemed within eight days after the same shall be distrained, be sold by public cant to the highest and fairest bidder, at such time or times, and in such convenient place or places, as the person distraining, his agent or bailiff, shall for that purpose appoint: such person, his agent or bailiff, after default made in redeeming such distress within the time aforesaid, first causing one or more notice or notices in writing of the place and time intended for such sale, to be posted up six days previous to the time of such sale, in the next market town to such place, at the usual place in such market town for posting up public notices: and that the price and prices for which such distress shall be *bonâ fide* then and there sold, shall be deemed and taken as between all the parties, and all persons deriving under them respectively, to be the full and real value of such distress, and that such value shall not afterwards be questioned in any Court of law or equity: and in case such distress shall be sold for more than is due and owing to the person or persons for whose benefit such distress shall be taken, such overplus, after deducting thereout all necessary expenses attending the taking and selling such distress, shall be paid over to the person and persons from whom such distress shall be taken.

69. It has been uniformly considered that distresses taken for rent

(i) 10 & 11 Car. I. c. 7. These is no corresponding English Act.

(j) 25 Geo. II. c. 13, s. 5, Irish. The English Statute, 2 Will. & M. c. 5, s. 2,

limits the period for sale of distresses to five days, and varies in many other respects from the Irish Act.

be sold under the provisions of the preceding Act sooner than the day after seizure, so that if a distress be made on the first day of the month, a sale cannot lawfully be had before the fifteenth of November; the six days' notice of sale required by the Statute do not begin until after the period of eight days allowed for redeeming the distress. The notice of sale should be posted on or before the day after the caption: where a distress is made on Monday, the first of November, the notice of sale should be posted on or before the ninth of November, to take place on Monday, the tenth of November. Posting the notice on any day after the eighth and before the ninth day, provided the sale be advertised and before the fifteenth day, is unobjectionable. By the English Statute a tenant is only allowed five days to replevy or redeem the distress, and it has been ruled^(l), that where five days are suffered to elapse, calculating twenty-four hours to each day, it will be sufficient; the distress be sold before the expiration of 120 hours from the time of the taking, the distrainer may be sued either in trespass^(m), or for any loss or injury sustained by such premature sale. In consequence of this decision, it will always be prudent not to commence the sale of chattels distrained until a later hour on the day of seizure than the hour of making the seizure on the day of commencing distress, and also than the hour of the day when the notice of sale is posted: if the distraining commence at ten o'clock in the forenoon of the first of November, or if the notice of sale be posted at ten o'clock on the ninth of November, the sale ought not to take place before ten o'clock, or some later hour, on the fifteenth of November.

Chattels loose⁽ⁿ⁾ or in the straw, in cocks or sheaves, when distrained, should lawfully be removed from the premises, and should be sold^(o) on the fifteenth day after seizure, in the same manner as other distress subjects: and as crops distrained, when growing, cannot be sold before they are ripe, gathered and saved, if they continue on the ground longer than fourteen days after their seizure, they should be sold without delay^(p) as soon as they are gathered, saved and brought to market; but six days' previous notice of the intended sale must be given.

Chattels distrained ought to be sold on the fifteenth day after seizure.

^(l) Will. & M. c. 5, s. 2, English.
^(m) *Price v. King*, 1 H. Bla. 13;
⁽ⁿ⁾ *Taswell*, 6 Carr. & P. 166.
^(o) *per v. Taswell*, 6 Carr. & P.

Will. & M. sess. 1, c. 5, s. 3, English.
^(o) *Piggott v. Birtles*, 1 Mees. & W.
 448, by Parke, Baron; *Tyrw. & Gr.*
 738.

^(p) 56 Geo. III. c. 22, s. 4, Irish; 2

^(p) 56 Geo. III. c. 88, s. 15, Irish; 11
 Geo. II. c. 19, s. 8, English.

seizure, unless the sale be postponed or adjourned by the express desire of the tenant, as the distrainer is not justified, without the tenant's concurrence, in continuing the distress on the demised premises at that day, nor in detaining the subjects distrained in pound for longer period. Where the lessee of a farm covenants to consume the hay and straw on the demised premises, the landlord is justified in selling(*q*) the hay and straw which he distrained for rent, subject to a stipulation that the purchaser shall consume it on the premises because the tenant himself could not have disposed of the goods on any other terms.

70. A distress may be altogether wrongful when commenced without cause, or after a lawful commencement it may be improperly or irregularly conducted, or the value of the chattels seized as a distress may be excessive in proportion to the amount of the demand.

If a landlord distrain(*r*) where no rent is due, or if a distress for rent be made after sun-set and before sun-rise, or an article be taken which is privileged by law, or if the rent in arrear be tendered before any part of the goods distrained be impounded, the property so illegally taken(*s*), or distrained, may be rescued; but after such chattels have been actually impounded, or placed upon a part(*t*) of the demised premises, pursuant to the provisions of the Irish Statute(*u*) 15 Geo. II. c. 8, a rescue cannot be justified, the goods then being in custody of the law: if the tenant, after such unlawful distress, redeem(*v*) the property by paying the sum demanded, an action of trover lies against the wrong-doer, although the goods have been restored. A tenant, however, is guilty of great imprudence in attempting a rescue, because ample compensation for the injury may be recovered by replevying the distress, or by other proper form of action: if goods be wrongfully distrained, where no rent is in arrear, or after the rent has been duly tendered, the legality of the distress may be disputed(*w*) in replevin, or by action of trespass, or the tenant may waive the trespass and bring an action on the case: where goods were wrongfully distrained, and

(*q*) *Abbey v. Petch*, 8 Mees. & W. 419; but see *Frusher v. Lee*, 10 Mees. & W. 709.

(*r*) *Bevil's case*, 4 Rep. 11, B.; Co. Litt. 160, B.; *Firth v. Purvis*, 5 T. R. 432; Co. Litt. 47, B.

(*s*) *Cotsworth v. Betison*, 1 Ld. Raym. 105; 1 Salk. 247; *Ladd v. Thomas*, 12 Ad. & Ell. 117; 4 P. & Dav. 9, S. C.

(*t*) *Thomas v. Harries*, 1 Mann. &

Gr. 695; 1 Scott, N. R. 524.

(*u*) 15 Geo. II. c. 8, s. 6, Irish.

(*v*) *Shipwick v. Blanchard*, 6 T. R. 298.

(*w*) *Branscomb v. Bridges*, 1 B. & C. 145; 2 D. & Ry. 256; *Holland v. Bird*, 10 Bing. 15; 3 Moo. & Sc. 363; *Ladd v. Thomas*, 12 Ad. & Ell. 117; 4 P. & Dav. 9, S. C.

; cattle are distrained *damage-feasant*, tender of amends, impounding, renders their detention unlawful; but a tender s after impounding comes too late, and will not enable a o support an action in trespass, or in case, for detaining the e proper remedy in such cases is by summary proceeding Statutes(a) on the subject. A tender made of the rent in b the expenses of distraining before impounding(b), may be bar to an avowry for rent; and, in like manner, tender of fore impounding affords a good answer(c) to an avowry for *damage-feasant*.

ss *v.* Fisher, 7 Bing. 153 ; 4
90 ; Swann *v.* Ld. Falmouth,
456 ; 2 M. & Ry. 534, S. C. ;
edy by civil bill see title " Re-
. 95, *post*.
ne *v.* Powell, 4 Bing. 230 ;
4.
ff *v.* James, 1 Bing. 341 ; 8
Anscomb *v.* Shore, 1 Campb.
15, and the note ; 1 Taunt.
e the Six Carpenters' case, 8
.. ; Gilb. Distr. by Hunt, 89.
o. III. c. 71, Ir. ; 7 Geo. IV.
v. Elliott, 5 Ad. & Ell. 142 ;
I. 606 ; Thomas *v.* Harries,
Gr. 695.
ne *v.* Powell, 4 Bing. 230 ;
4.
Six Carpenters' case, 8 Rep.
Dye *v.* Leatherdale, 3 Wils.

(e) *Griffin v. Scott*, 2 Ld. Raym. 1424; *Winterbourne v. Morgan*, 11 East, 395; *Ladd v. Thomas*, 12 Ad. & Ell. 117, by Ld. Denman; 4 P. & Dav. 9; but see *Pitt v. Shew*, 4 B. & Ald. 206, where it was left to the jury whether the goods were sold within a reasonable time.

(f) *Aitkenhead v. Blades*, 5 Taunt. 198; 1 Marsh. 17.

(g) *Etherton v. Popplewell*, 1 East, 139.

(h) *Gargrave v. Smith*, 1 Salk. 221.

(i) *Oxley v. Watts*, 1 T. R. 12; *Bagshaw v. Gaward*, Yelv. 96; *Cro. Jac.* 147, S. C.; *Chamberlayn's case*, 1 Leon. 220; *Gates v. Bayley*, 2 Wils. 313.

(j) Year Book, Assis. 27 Edw. III. fo. 143, pl. 64; *Bro. Abr. Trespass*, pl. 250; 1 Ro. Abr. 673; *Distress*, P. pl. 7.

(k) *Dod v. Monger*, 6 Mod. 226.

beer from one of them, he becomes a distrainer *ab initio*, so far as regards that barrel: and if furniture be distrained in a dwelling-house for rent, the bailiff either should place all the goods in one room, remove them out of the house, for by keeping the furniture in the several rooms, and going into different parts of the house without the tenant's acquiescence^(l), the distrainer becomes a trespasser *ab initio*. Where, however, the act done is only wrongful as to part of the goods distrained, no wrong being done as to the residue, the wrong-doer becomes a trespasser by relation, merely as to that part of the goods in respect of which the wrongful act was committed. In an action of trespass, if the landlord justify the seizure as a distress, an abuse of the distress⁽ⁿ⁾ may be replied, as the subsequent misconduct is considered a substantive act of trespass, which is carried back by relation to the original taking, and renders the distrainer a trespasser "*ab initio*."

72. Where, however, an entry, authority, or license, given by the party, is abused, the person committing^(o) the abuse may be punished for the mischief done, but shall not be a trespasser *ab initio*: and though cattle which have been distrained for arrears of a rent-charge^(p), be worked or killed, or goods so distrained be abused by the distrainer, such acts will not constitute him a trespasser *ab initio* because a distress for a rent-charge must be made under an authority conferred by the party: the distinction between the abuse of an authority in fact, and an authority given by law, may be accounted for on the ground, that in order to protect persons from the abuse of an authority conferred by law, it is reasonable that every thing should be rendered void when the license is abused, and that the person guilty of such abuse should be left in the same situation as if he acted without any authority: but where an act is done by the abuse of an express authority in fact, it is considered that the party voluntarily conferring such license on another, has no right by reason of any subsequent matter to avoid acts done by his own license and authority.

73. An action of trespass does not lie for mere *non-feasance*, and therefore, in general, the omission^(q) to do an act, or as it is styled by Chief Baron Gilbert, "the negative abuse of an authority" given by

(l) Washbourn v. Black, 11 East, 405, note. Salk. 221.

(m) Harvey v. Pocock, 11 Mees. & W. 740.

(n) Dye v. Leatherdale, 3 Wils. 20; Bagshaw v. Gaward, Yelv. 96; Cro. Jac. 147; Noy. 119; Gargrave v. Smith, 1

(o) The Six Carpenters' case, 8 Rep. 146, B.; 3 Bla. Comm. 213; Perk. sec. 190, 191; Bull. N. P. 81.

(p) Bac. Abr. Trespass, B.

(q) Bac. Abr. Trespass, B.; The Six Carpenters' case, 146, B.

law, does not cause a person to be deemed a trespasser *ab initio*: if cattle be distrained damage-*feasant*, and the distrainer refuse to restore them upon tender of amends before impounding, this is a negative(*r*) abuse of the license given by law to distrain, and as the injury arises solely from *non-feasance*, the distrainer does not become a trespasser *ab initio*; but as the impounding after tender of amends is a new taking, and a substantive act of trespass, the owner of the cattle may recover damages for their detention in replevin or trespass. So if cattle be distrained for rent, and the lessee tender the rent and costs before impounding(*s*), and require that his cattle shall be restored, the non-compliance of the landlord being only *non-feasance*, does not make him a trespasser *ab initio*. If a lease contains an express clause of distress which is strictly pursued by the landlord, the distraining will be referred to the express authority given by the lessee, and not to the common law right of distress incidental to the rent-service, so as to protect the landlord from being treated as a trespasser *ab initio*, in case of irregularity in conducting a distress.

74. English landlords have been in a great measure relieved from the risk incurred through the mismanagement of distresses for rent. by the English Statute(*t*), 11 Geo. II. c. 19, which enacts, that where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agents, the distress itself shall not be therefore deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio*: but the party aggrieved by such unlawful act, or irregularity, shall recover full satisfaction for the special damage he shall have sustained thereby, and no more, in an action of trespass(*u*), or on the case at his election.

By the construction which this Statute has received(*v*), the election allowed to the tenant to bring trespass, or case, must be regulated according to the nature of the injury, and an action of trespass must be resorted to, where, by the general rules of law, trespass would be the proper remedy, so that the only alteration introduced by the Statute is, that if a distress be duly commenced, and afterwards any irregularity

(*r*) The Six Carpenters' case, 8 Rep. 146, B.; Isaack v. Clark, 2 Bulstr. 312, by Coke, C. J.; but see 2 Ro. Abr. 561, G. pl. 8.

(*s*) Malpaz's case, Year Book, 33 Hen. VI. fo. 26, 27, pl. 12; Evans v. Elliott, 6 Nev. & M. 606; 5 Ad. & Ell. 142, S. C.

(*t*) 11 Geo. II. c. 19, s. 19, 20, English; there is no corresponding enactment in Ireland.

(*u*) Messing v. Kemble, 2 Campb. N. P. C. 115.

(*v*) Winterbourne v. Morgan, 11 East, 395; 2 Selw. N. P. 1349, note; Harvey v. Pocock, 11 Mees. & W. 740.

be committed, or wrong done in its progress, the landlord can only be charged from the time when the injury originated. If any rent be at the time of distraining, although the distress be excessive, or the distress be irregular, an action(*w*) of trover cannot be maintained in England as that would in effect render the distrainer a trespasser *ab initio*: and upon the same principle, a party purchasing goods under a distress regularly(*x*) conducted, acquires sufficient title in the goods to enable him to maintain trover for their recovery.

75. Irish leases usually contain an express clause authorizing lessor and his assigns to enter and distrain in case the reserved rent shall be in arrear and unpaid for fourteen days, or some other limited time; and where the rent is due, and the authority is pursued, such license will prevent the landlord from becoming a trespasser *ab initio* by means of any abuse or irregularity in the conduct or management of a distress: when the lease does not contain any such clause, it is to be considered what acts, or irregularities in the progress of a distress, will render an Irish landlord a trespasser *ab initio*. A distrainer by committing any abuse of a distress, or by remaining in possession(*y*) of demised premises, without the tenant's acquiescence, longer than fifteen days, or by removing a distress(*z*) after such period had elapsed or by putting the tenant or his family out of possession, or by selling the property before(*a*) the time allowed by law, or by distraining goods(*b*) protected or privileged from distress, is guilty of a substantive act of trespass, and in Ireland will be deemed a trespasser *ab initio*.

Shortly after the passing of the English Act(*c*), 2 Will. & M. c. 1 authorizing the sale of distresses for rent, it was contended, that if the authority conferred by the Act were not strictly pursued, the party distraining became a trespasser *ab initio*: however, where notice of distress was delivered personally to the owner of the goods, instead of being left, as required by the Statute, at the most notorious(*d*) place on the premises, the Court ruled that such personal notice was sufficient to warrant a sale of the distress: and where the notice was gi-

(*w*) *Wallace v. King*, 1 H. Blackst. 16; *Whitworth v. Smith*, 1 Moo. & Rob. 193.

(*x*) *Lyon v. Weldon*, 2 Bing. 334; 6 Moo. 629; *Wallace v. King*, 1 H. Bla. 13.

(*y*) *Griffin v. Scott*, 2 Lord Raym. 1424.

(*z*) *Winterbourne v. Morgan*, 11 East, 395; and see *Anthony v. Haneys*, 8 Bing.

186; 1 Moo. & Sc. 300.

(*a*) *Harper v. Taswell*, 6 Carr. & 166.

(*b*) *Harvey v. Pocock*, 11 Mess. W. 740.

(*c*) 2 Will. & M. ch. 5, English.

(*d*) *Walter v. Rumball*, 4 Mod. 312; 12 Mod. 76; 1 Ld. Raym. 53; 1 S. 247.

in the name of a wrong person, the want of notice was held only to be an irregularity(*e*), which did not render the distrainor a trespasser *ab initio*. The omission to post notice of the intended sale of a distress in a market town, was held by Chief Baron Joy(*f*) insufficient to make the party distraining a trespasser, where the notice appeared to have been posted *bonâ fide* in a public place, as he considered the reference in the Statute(*g*) to a market town was only directory. A distrainor having continued in possession for ten days longer than the time allowed by law for the sale of distresses, and having only removed the goods during the last four days, it was ruled(*h*) that his continuance in possession, and removal of the goods after the time limited by law, were substantive acts of trespass, which entitled the tenant to damages; but in a subsequent case it was held(*i*) to be lawful for the landlord, and those acting under him, to continue more than five days upon the premises for the purpose of selling the goods distrained, and that it should be left to the jury to say, what was a reasonable time after that period for the sale of the property. It was also ruled at Nisi Prius, that a *bonâ fide*(*j*) adjournment of the sale of goods distrained for rent, without the tenant's concurrence, would not make the party distraining a trespasser. If growing crops be distrained, and the rent in arrear(*k*) be tendered at any time before the crops arrive at maturity, and the landlord afterwards sell the crops when gathered, he may be proceeded against as a trespasser; but if the crops be sold by the landlord, while growing, such sale is absolutely void.

In an action on the case for improperly conducting a distress, the mode in which the rent becomes due, the party to whom it is due, and by whom the distress is made, are all material allegations(*l*), and must be strictly proved; for if the rent were not due to the party distraining, trespass, and not case, would be the proper form of action. In an action on the case for an irregular distress of goods, or of growing crops, which were legally distrainable, if the value of the property sold do not exceed the rent in arrear, the tenant will only be entitled to nominal

(*e*) *Wootley v. Gregory*, 2 Y. & Jerv. 536-543; but see Com. Dig. Trespass, C. 2, referring to *Walter v. Rumball*, 4 Mod. 391.

(*f*) *Hamilton v. Labertouche*, Nisi Prius Sittings after Hilary, 1830; but see *Dwyer v. Peacock*, 2 Fox & S. 34.

(*g*) 25 Geo. II. c. 13, s. 5, Irish.

(*h*) *Winterbourne v. Morgan*, 11 East, 395; *Griffin v. Scott*, 2 Ld. Raym. 1424; 2 Stra. 717.

(*i*) *Pitt v. Shew*, 4 B. & Ald. 208.

(*j*) *Hamilton v. Labertouche*, Sittings after Hilary, 1830, by Joy, C. B.

(*k*) *Owen v. Legh*, 3 B. & Ald. 470; and see *ante*, "Distress," No. 33.

(*l*) *Proudlove v. Twemlow*, 3 Tyrw. 260; 1 Cro. & M. 320; *Briggins v. Goode*, 2 Tyrw. 447; 2 Cro. & Jerv. 364; and see *Harvey v. Pocock*, 11 Mees. & W. 740.

damages; and if the rent in arrear be less than the value of the property distrained, the amount of the rent due should be deducted from the difference between the price which might have been obtained for the goods, if the sale had been regularly conducted, and the price which the goods or crops actually produced. The Statute 25 Geo. II. c. 13 (m) does not extend to distresses taken *damage-feasant*, which continue to be mere pledges, and if sold, the party distraining (n) becomes a trespasser *ab initio*.

76. Any irregularity committed in the conduct of a distress for rent, may be waived by an act of the tenant, recognizing the validity of the landlord's prior proceeding. The tenant's consent to postpone the sale (o) of a distress, operates as a waiver of an irregularity in omitting to deliver a *particular* of the rent in arrear, or in posting notice of the sale: but a right of action which became vested in a tenant, for an excessive distress, will not be defeated by a subsequent agreement allowing the landlord to postpone the sale (p) of the goods distrained, unless satisfaction be made to the tenant for the wrong done, or a stipulation be entered into that the tenant shall not sue for redress.

77. By the common law, the right of the landlord was restricted to the seizure (q) of a reasonable distress for rent; and by the Statute (r) of Marlbridge it is enacted, that distresses shall be reasonable, and not too great, and that he who takes great and unreasonable distresses shall be grievously amerced for the excess of such distresses.

A party is not chargeable for taking an excessive distress, where only a single chattel is seized, though it far exceed in value the amount (s) of the rent in arrear; but if there are several articles of some value, and much more is taken than is sufficient to satisfy the rent and expenses, the action may be supported without any evidence of express malice. The distress, however, must be obviously disproportionate to the rent due, as a trivial excess will not warrant the action; and in order to determine whether a distress was excessive, it must be ascertained what sum the goods seized (t) would have produced at a broker's sale. It was formerly considered, that although a landlord

(m) 25 Geo. II. c. 13, s. 5, Irish; 2 Will. & M. c. 5, English.

(n) Dorton v. Pickup, 1 Selw. N. P. 686, note.

(o) Dwyer v. Peacock, 2 Fox & Sm. 34; Burgess v. Clowry, 1 Crawf. & Dix, 350.

(p) Willoughby v. Backhouse, 2 B. & Cress. 821; 4 D. & Ry. 539; Sells v.

Hoare, 1 Bing. 401; 8 Moore, 451; Carr. & P. 28; and see Holland v. Bir-
10 Bing. 15; 3 Moo. & Sc. 363, S. C.

(q) 2 Instit. 107.

(r) 52 Hen. III. c. 4, Eng. and Iri- sh.

(s) Field v. Mitchell, 6 Espin. N. P. C. 71; Avenell v. Croker, Moo. & M- lk.
172.

(t) Wells v. Moody, 7 Carr. & P. 59.

much larger sum than was due to him for rent at the time of making, yet if the distress(*u*) actually made were not unreasonable, for the purpose of discharging the rent *bondâ fide* due, an action would lie for the excessive demand. It has, however, been since held that where a distress was unlawful in its inception(*w*), being made for more than was due, an action lay at common law for the recovery of that the sale of the distress was only matter of aggravation: and where, if a distress was made for more than was due, the relinquishment of the excessive sum demanded, by notice to the tenant, did not make it any more wrong, any more than the return of an article converted, or conversion.

A landlord seize as a distress for rent an unreasonable quantity of distressable(*x*) subjects which have been created by Statute, such as corn, or loose, or in the straw, hay, or growing crops, either jointly with other chattels, he will be liable, under the Statute of 1729, to make compensation for the injury, because the Statute is not intended to extend on the party distraining, of taking only a reasonable quantity, and cannot be varied by an extension of his powers: and where the distress consists of growing crops, the measure of the damages in an action for excessive distress, is not the value of the crops, but the price and expense which the tenant suffers by being deprived of the enjoyment of his crops, and in being obliged to provide surety for a larger sum, in order to replevy the distress. In an action on the case for an excessive distress, a landlord is not precluded from recovering an arrear of rent, which became due prior to other arrears(*y*) which have been levied by distress, though the notice stated such first distress was made for rent due up to a specified time, which was subsequent to the day when the arrears forming the subject of the second distress accrued, and though, upon making the second distress, the bailiff stated it was made for rent incurring due after the first distress.

In order to sustain this action, it is not essential there should have been an actual seizure of goods; as payment of the sum demanded, though less was really due, made by the tenant(*z*) *under protest*, in consequence of a threat of distress, will be sufficient. A recovery by a writ of replevin, is a bar to an action for excessive distress, as a party

Don v. Terry, 1 Moo. & Rob.

Don v. Croker, Moo. & Malk.

Don v. Henniker, 4 P. & Dav. & Ell. 488, S. C.

Don v. Birtles, 1 Mees. & W.

441-449; Tyrw. & Gr. 729-738, S. C.

(*y*) *Gambrell v. Ld. Falmouth*, 4 Ad. & Ell. 73; 6 Nev. & Mann. 859, S. C.

(*z*) *Hutchins v. Scott*, 2 Mees. & W. 809.

who has treated the taking as wholly tortious, by his replevin, not afterwards be permitted to allege it was in part rightful; appear(*a*) on the trial of an action for taking an excessive distress there was no cause for distraining, the plaintiff ought to be non An action of trespass does not lie for an excessive distress(*b*), t remedy for the injury being an action on the case, founded on t tute, except where the distress consists of gold and silver(*c*), w of a certain known value. Money may be lodged in Court, purs to the Statute, in satisfaction of damages sought to be recover an action for an illegal or excessive distress.

78. By the Statute(*f*), 15 Geo. II. c. 8, it is enacted, th actions of trespass, or upon the case, to be brought against any entitled to rents, or services of any kind, his bailiff, or receiver, other person, relating to any entry upon the premises chargeat such rents and services, or to any distress, or seizure, sale, or of any goods, or chattels thereupon, it shall be lawful for the de in such actions to plead the general issue, and give the special in evidence; and in case the plaintiff in such action shall becom suit, discontinue, or have judgement against him, the defendat recover double costs of suit.

A party can only justify under the general issue given by t tute, for acts done as landlord(*g*) in making a distress, and not expulsion of the tenant or his family: and if the goods continue premises beyond the time allowed by law for their sale, the la under this issue, cannot justify an entry(*h*) to remove them afte but must plead a license to warrant the removal, or "soil a hold" to justify the expulsion.

Where cattle are fraudulently removed from demised premises purpose of avoiding a distress, and are followed and distrained p to the 15 Geo. II. c. 8, upon a plea of the general issue to ar of trespass(*i*) for the seizure, the landlord cannot give the

(*a*) *Phillips v. Berryman*, 3 Dougl. 288; 1 Selw. N. P. 693; and see *Grace v. Morgan*, 2 Bing. N. C. 534; 2 Scott, 790.

(*b*) *Hutchins v. Chambers*, 1 Burr. 590; *Lyne v. Moody*, Fitzg. 85; 2 Stra. 851, S. C.

(*c*) *Moir v. Munday*, cited 1 Burr. 596.

(*d*) 3 & 4 Vict. c. 105, s. 46, Irish; 3 & 4 Will. IV. c. 42, English.

(*e*) *Young v. Robinson*, 4 Irish Law Rep. 13.

(*f*) 15 Geo. II. c. 8, s. 10, Irish, per-

petuated by the 8th Geo. III. c. 11 Geo. II. c. 19, s. 21, English

(*g*) *Bisset v. Caldwell*, Peak C. 36; *Gilb. Distress*, by H *Etherton v. Popplewell*, 1 Ea *Ashcroft v. Brown*, 3 B. & Ad. 4 see *Purcell v. Nowlan*, Smyth 53; 1 Irish Law Rep. 258.

(*h*) 15 Geo. II. c. 8, s. 1, Irish II. c. 19, s. 1, English.

(*i*) *Postman v. Hurrell*, 6 Co 225; *Furneaux v. Fotherby*, 4 N. P. C. 136; *Vaughan v. Dav pin. N. P. C. 256.*

matter in evidence, but must plead a special justification under the Statute. It was decided, that a landlord might waive his privilege of giving the special matter in evidence under the general issue(*j*), without compromising his right to double costs, as the two branches of the Statute are quite unconnected with each other; but by the Statute(*k*), 5 & 6 Vict. c. 97, the landlord is now deprived of any right to double costs.

79. A pound-keeper is bound to receive and detain(*l*) in his pound, cattle offered to his custody, and being liable to an action for refusing to take cattle distrained, he is not answerable for the lawfulness of their seizure; if cattle be wrongfully taken, the person making the caption, or bringing them to the pound, is answerable, and not the pound-keeper, unless by exceeding the limits of his duty, he assent or make himself a party to the trespass: after cattle have been impounded, though without cause, they cannot be discharged without replevin, or the consent of the party who placed them in custody of the law; and if the pound be broken, and the cattle rescued, an action can only be brought by the party interested, and not by the pound-keeper, and the distrainer(*m*) may retake the distress wherever it shall be found, and replace it in lawful custody. Cattle having been distrained damage-*feasant*, it appeared they were taken in a place(*n*) in which their owner had right of common, and being impounded in a fold on the waste without any bolt or fastening, it was ruled that their owner might retake them on fresh pursuit.

Rescue, so far as it relates to distress, is the taking away chattels(*o*) out of the custody of the distrainer, contrary to law: the party injured was entitled, at common law(*p*), to a writ of rescous, but this remedy being found insufficient, it was enacted(*q*), that upon any pound-breach, or rescue of goods or chattels distrained for rent, the person aggrieved shall, in a special action on the case for the wrong sustained, recover treble damages and costs(*r*) against the offender, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession. Another remedy was also given by means of *recaption*, which was confined to cases in which the chattels rescued

(*j*) *Gambrell v. Ld. Falmouth*, 6 Nev. & M. 589.

(*k*) 5 & 6 Vict. c. 9, s. 2, Eng. & Ir.

(*l*) *Badkin v. Powell*, 2 Cowp. 476.

(*m*) Co. Litt. 47, B.

(*n*) Year Book, 30 Edw. III. fo. 26, B.; Co. Litt. 47, B., and note 303 from Ld. Hale's MSS.

(*o*) Bull, N. P. 61; Co. Litt. 160, B.

(*p*) *Rich v. Woolley*, 7 Bing. 661; 5 Moo. & P. 663.

(*q*) 7 Will. III. c. 22, s. 6, Irish; 2 Will. and M. Sess. 1, c. 5, s. 4, English.

(*r*) But see as to costs, 5 & 6 Vict. c. 97.

could be retaken without breach of the peace, and upon fresh pursuit. Lord Coke says: "when a man hath taken a distress, and the cattle are distrained, as he is driving them to the pound(s), go into the house to the owner, if he that took the distress demand them of the owner, and he deliver them not, this is a rescous in law:" but where cattle were distrained *damage-feasant*, and the distrainer left them, in order to surprise the owner, and during his absence, the cattle went on the owner's land(t), and remained there half an hour without being demanded. During that time, it was held that the distrainer, on his return, had no right to retake the cattle, because his absence for such a period was an abandonment of the right of fresh pursuit. If cattle impounded *damage-feasant* escape from pound without any default of the distrainer, no trespass lies against the owner for the injury committed by his cattle, but if the cattle escape(u) from the defective state of the pound, an action does not lie against their owner, unless the cattle get back into his possession. Where a bailiff in possession of goods under a landlord's distress for rent, receives an execution from the sheriff, and sells the goods under it, the sheriff is liable in an action(v) for pound-breach and rescue at the suit of the landlord, being the same thing as if the sheriff had taken the goods out of the custody of the landlord.

By the Irish Statute(w) 6 Geo. IV. c. 43, it is enacted, that if any person shall rescue any cattle which shall have been lawfully seized for the purpose of being impounded, or shall break down, injure, or destroy any pound legally constituted (whether any cattle shall be impounded there or not), or shall commit any pound-breach or rescue, whereby any cattle of any description shall escape or be enlarged from any such pound, every such person shall be deemed guilty of a misdemeanor, and upon conviction of such offence, either at the assizes or quarter sessions, shall be liable to suffer fine and imprisonment, at the discretion of the Court.

In distraining for rent, circumstances may occur rendering the presence of a constable proper, but to justify the landlord in calling him in, it must be shewn(x) there were threats of resistance, or apprehension of violence: and by the Statute(y) 7 & 8 Geo. IV. c. 67, it is provided that no police constable shall be employed, under the authority of the magistrates of the county, in the levy of rents by distress,

(s) Co. Litt. 161, A.

(t) Knowles v. Blake, 5 Bing. 499; 3 Moo. & P. 314, S. C.

(u) Vasper v. Eddowes, 1 Ld. Raym. 719; 1 Salk. 248; Holt, 256; 11 Mod. 21; 12 Mod. 658, S. C.

(v) Reddell v. Stowey, 2 Moo. & Rob. 358.

(w) 6 Geo. IV. c. 43, s. 2, Irish.

(x) Skidmore v. Booth, 6 Carr. & P. 777.

(y) 7 & 8 Geo. IV. c. 67, s. 17, Irish.

Except where forcible resistance shall have been actually made and proved by information taken on oath.

It is enacted by the Irish Statute^(z) 8 Geo. I. c. 2, that if any distress lawfully taken for rent or services, or other legal dues, shall be rescued, if the person on whose behalf such distress was taken, his agent or bailiff, or any person employed in taking such distress, shall, within fourteen days after such rescue, make oath thereof before any justice of the peace of the county where such rescue shall have been committed, then such justice shall, by warrant under his hand and seal, order and require one or more constable or constables of the county to go with and assist the person, on whose behalf such distress was taken, his agent or bailiff, or the person employed by him, or the person making such oath, to distrain again for the said rent, services, or other legal dues, and to take with him a number of persons sufficient to secure and convey the distress, so by him or them to be taken, to some lawful pound; provided that before such warrant shall be granted, there shall be deposited with the justice of the peace such reasonable sum of money as he shall require, to satisfy such constable or constables, and his and their assistants, for their pains and trouble in executing such warrant; which money so paid shall, in the first instance, be deducted out of the money arising by the sale of such distress, in case the same shall be sold, or otherwise shall be levied by distress and sale of the goods as in case of a distress for rent, or by civil bill against the person owing the rent for which such distress was taken, with costs of suit.

The Statute^(a) 6 & 7 Vic. c. 30, after reciting that it frequently happens that cattle which are lawfully impounded, or which are lawfully seized for the purpose of being impounded, are rescued from the pound or place in which they are so impounded, or on the way to or from such pound or place, and the expense of prosecuting such offenders, or obtaining redress for the injury occasioned by such rescue to the persons so entitled to distrain, is usually out of proportion to the damage for which such cattle are distrained, *enacts*, in case any person or persons shall release, or attempt to release any horse, cow, sheep, swine, or other beast or cattle which shall be lawfully seized for the purpose of being impounded, in consequence of having been found wandering, straying, or lying, or being depastured on any enclosed land without the consent of the owner or occupier of such enclosed land, from the pound or place where the same shall be so im-

^(z) 8 Geo. I. c. 2, ss. 8, 9, Irish.

^(a) 6 & 7 Vic. c. 30, s. 1, Eng. and Ir.

pounded, or on the way to or from any such pound or place, or to pull down, damage, or destroy the same pound or place, or any part thereof, or any lock or bolt belonging thereto, or with which the same shall be fastened, every person so offending shall, upon conviction thereof before any two of Her Majesty's justices of the peace, forfeit and pay any sum not exceeding five pounds, together with reasonable charges and expenses, or in default thereof be committed by such justices, by warrant under their hands and seals, to the house of correction of the county wherein the offence shall have been committed, to be kept to hard labour for any time not exceeding three calendar months, nor less than fourteen days, unless such sum of money costs shall be sooner paid: and it shall be lawful for such justices to award the whole or any portion of such penalty to the person or persons on whose behalf such cattle were distrained; provided that nothing therein contained shall authorize any justices to hear and determine any case of pound-breach or rescue in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency or any execution under the process of any Court of justice, or as to the obligation of maintaining or keeping in repair any wall, hedge, palisade, ditch, sunk fence, or fence whatsoever.

The preceding Statute only extends to distresses made for causes specifically enumerated, and is not applicable to any distress made for rent.

CHAPTER IV.

REPLEVIN.

1. *Nature of Replevin, and when the Writ shall be superseded.*
2. *Origin of the Proceeding by Replevin.*
3. *Writ of Recaption.*
4. *Replevinders and their Duty.*
5. *Replevin for Goods under Execution, or belonging to the Crown.*
6. *Does not lie for Title-Deeds, nor for Articles affixed to the Freehold.*
7. *Title of the Claimant in Replevin.*
8. *Distress replevisable at any Time before Sale.*
11. *Sheriff's Liability on replevying Distresses under Statute, 36 Geo. III. c. 38.*
12. *Assignment of Replevin Bond by Sheriff.*
13. *Condition to prosecute Suit with Effect and without Delay.*
14. *Remedy against Sheriff for taking insufficient Pledges.*
15. *Extent of Liability of Sureties.*
16. *Proof of Sufficiency of Sureties.*
17. *Sureties have no Lien on Goods restored by Replevin.*
18. *Venue in Action against Sheriff, and on Replevin Bond.*
19. *Suggestion of Breaches, after Judgement by Default, on Replevin Bond.*
20. *Sureties entitled to Relief where Time given to principal Debtor.*
21. *Staying Action on Replevin Bond.*

SURETIES IN REPLEVIN.

9. *Obligation of Sheriff to take Sureties under Statute of Westminster 2nd.*
10. *Security required under Irish Statute 8 Geo. I. c. 6.*

1. REPLEVIN is the appropriate remedy for asserting a right by a person, from whom goods or chattels are unlawfully taken(*a*), to have them immediately restored, upon giving security to return the property, in case it shall be so adjudged. The proceeding by replevin has, in many instances, the injurious effect of depriving a party of his *prima facie* evidence of title to the goods(*b*), arising from the mere fact of possession, and should not be resorted to, unless the person issuing the writ had an unqualified and unequivocal possession of the property. If a replevin out of Chancery be issued improvidently, or be abused, the Chancellor(*c*) will, before its return into a Court of law, order the writ to be quashed or superseded, and though Lord Redesdale ordered a replevin suit(*d*) to be discontinued, after plea pleaded, yet in later cases it has been held, that after the writ is returned, any application on the subject(*e*) ought to be made to the Court of law.

(*a*) Chamberlain, *ex parte*, 1 Sch. & Lef. 320; In the Matter of Wilsons, Bankrupts, 1 Sch. & Lef. 320, note; Shannon v. Shannon, 1 Sch. & Lef. 324; Templeman v. Case, 10 Mod. 25.

(*b*) Comerford v. Blake, 2 Irish Eq. Rep. 176; Shannon v. Shannon, 1 Sch.

& Lef. 324; Dunne v. Bergin, 1 Moll. 522.

(*c*) Comerford v. Blake, 2 Irish Eq. Rep. 176; M'Carthy v. Maguire, 1 Moll. 47.

(*d*) In the Matter of Wilsons, Bankrupts, 1 Sch. & Lef. 320, note.

(*e*) Quin v. Dowling, 1 Moll. 48, note;

The writ of replevin is not absolutely restricted to the getting of goods taken as a distress, and may be beneficially(*f*) adopted in cases where an action of trover would not afford an adequate remedy. A replevin sued out of Chancery for the purpose of getting back goods which were procured under a contract to convey them to Philadelphia, having been returned into the Queen's Bench, an application to quash the writ(*g*) was refused by the Court of law, as there were important legal questions to be tried between the parties. If stolen goods are taken out of the possession of a *bonâ fide* purchaser by means(*h*) of a replevin, the writ will be quashed by the Court of law into which it is returned, and an order will be made to restore the property taken under it. The expression that "replevin does not lie," is often applied to cases in which it is only meant that the suit cannot be successfully prosecuted by the party replevying, and does not imply that the writ should be superseded.

2. Replevin is a personal action, though the title to lands may incidentally come into question, and is commenced either by original writ out of Chancery, or by plaint, or by civil bill upon a distress for rent not exceeding fifty pounds. The jurisdiction in questions relating to distresses, belonged peculiarly, by the common law, to the Royal prerogative(*i*), and as such matters required despatch, a special authority was delegated to the sheriff to make replevins, not in his capacity of sheriff, but as *justiciarius regis*: the original writ of replevin was derived from the common law, and conferred on the sheriff(*k*) judicial power to decide the matter complained of, while the authority he received from other writs was merely ministerial. The original writ was not made returnable, and was in nature of a *justicies*, empowering the sheriff to hold plea in his County Court, respecting the matter in dispute between the parties, and if nothing were done under the first writ, there issued(*l*) a second or *alias* writ, which was followed by a *pluries*

Dunne *v.* Bergin, 1 Moll. 522; Power's case, 1 Moll. 524.

(*f*) Dore *v.* Wilkinson, 2 Stark. N. P. C. 288; Le Mason *v.* Dixon, W. Jones, 173; Anon. 1 Moll. 390.

(*g*) Corscaden *v.* Stewart, 1 Irish Law Rep. 106; and see Farrell *v.* Beresford, 1 Ball & B. 328.

(*h*) Doyle *v.* Kelly, 4 Irish Law Rep. 9; Anon. 1 Moll. 390; and see Griffiths *v.* Stephens, 1 Chitty's Rep. 196, as to a replevin of goods sold under a distress for rent.

(*i*) Detentio namii pro districtione facienda pertinet ad coronam domini re-

gis, sed quia placitum istud dilationem non capit, vice-comiti conceditur terminandum, sicut justiciarius domini regis. Bracton. 155, B., lib. 3, De Corona, cap. 37.

(*k*) Gilb. Repl. by Hunt, 87; 2 Instit. 139; Mounsey *v.* Dawson, 1 Nev. & P. 763, and the note; 6 Ad. & Ell. 752; Hallett *v.* Birt, 1 Lord Raym. 218; 5 Mod. 252; and see 19 Vin. Abr. Replevin, Z. plac. 8.

(*l*) See the note of the Reporters on the practice of Replevin, 2 Fox & Smith, 152; 1 Brownlow's Rep. 167; 3 Bla. Comm. 147.

nable into the King's Bench or Common Pleas, and com-
 ie sheriff to signify the cause wherefore the claimant's goods
 eplevied : the authority given to the sheriff by the original
 writs to hold plea of the subject in controversy, was altoget-
 ered(*m*) by the *pluries* writ, because he was supposed to
 cted his duty upon two occasions, and should no longer be
 h *judicial* power, and, therefore, the further cognizance of
 is committed to the King's Courts.

he wars between Henry the Third and his barons had sub-
 as found expedient to pass an Act(*n*) declaratory of the law
 ject of distresses, and introducing provisions for the purpose
 ; tenants from the oppressive abuse of distresses by their
 eriors, and accordingly it was enacted by the Statute of
 e, that if cattle (*averia*) of any person were taken and wrong-
 olden, the sheriff, after complaint made to him thereof,
 ver them, without let or gainsaying of him that took them.

common law, the sheriff had no jurisdiction to grant reple-
 ot in his county court, and then only by writ out of Chan-
 by the Statute of Marlbridge he was enabled to grant(*o*)
 upon plaint without writ, and at all times, whether in or out
 t. By this Statute the sheriff, upon plaint made to him, may
 ally or by warrant, command his bailiff to deliver cattle or
 ained to the claimant ; and the sheriff is authorized to hold
 levin by plaint in his county Court to any amount, and
 ved by *recordari* into the King's Bench, or Common Pleas,
 e upon the legality of the distress, and award a return. The
 'ria' used in the Statute, signifies(*p*) beasts used for agri-
 rposes, and though by construction extended to all chattels,
 at the object of the enactment was only to give relief in
 stress. The proceeding by original writ out of Chancery
 e utterly obsolete in England(*q*), but still continues to be the
 ually adopted in Ireland ; and as fourteen days must be suf-
 pse between the act of distraining and the sale of a distress in
 ie delay in obtaining the writ is not attended with inconve-
 y the Irish Statute(*r*), 36 Geo. III. c. 39, the county Courts

loor v. Watts, 1 Ld. Raym.
 Repl. by Hunt, 107.

n. III. c. 21 ; the Statute
 e, A. D. 1267.

sey v. Dawson, 1 Nev. & P.
 & Ellis, 752, S. C. ; Hal-

lett v. Birt, 5 Mod. 252 ; Gilbert's Re-
 plevin, 92.

(*p*) Glossary by Ducange in verbo.

(*q*) Caithness v. Murphy, Smith &
 Batty, 8.

(*r*) 36 Geo. III. c. 39, Irish.

are prohibited from holding plea in any action, or issuing any writ or process against any person, his goods or chattels, but it is provided that nothing in the act contained shall deprive any such court of any jurisdiction or authority which by law such court then had in making replevin, and deliverance of distresses.

3. Before the sheriff replevies goods distrained, whether the proceeding for that purpose be by writ or by plaint, he ought to get(*s*) adequate security from the claimant to prosecute his suit, and to return the distress, if a return thereof shall be adjudged; and as the party distraining obtained sufficient security for his demand, it was considered reasonable that, pending suit, the plaintiff's goods should be protected against any further distress upon the same account for which the original distress had been made. In order to effect this object a writ of recaption was framed, which issues out of Chancery directed to the sheriff, and after reciting, that the claimant's goods had been replevied, and were again distrained for the same cause, commands the sheriff to deliver(*t*) to the claimant his goods until the chief plea between the parties shall be determined; and if the defendant had again taken the claimant's goods upon the same account he had before taken them, then to have his body at the next county court, and to punish him, if he should be convicted of the second taking upon one and the same account.

Neither the original nor *alias* writs of replevin(*u*) are ever issued, but the *pluries* writ, which is usually styled the "Chancery replevin," is sued out in the first instance, and is always(*v*) accompanied with a writ of recaption, which is served on the party distraining immediately after the goods distrained have been restored to the claimant under the sheriff's warrant, with a view of preventing any repetition of the distress. The court into which the replevin is returned will, upon affidavit of personal service of the writ of recaption, award an attachment against the distrainer, if he cause a second distress to be made upon the claimant's property on the same account for which the original distress was taken, and if it appear clearly that the goods seized under the original distress were sufficient to answer the demand of the party distraining. However an action on the case for distraining a

(*s*) 13 Edw. I. c. 2, s. 3, Westminster 2, English and Irish; 36 Geo. III. c. 38, Irish.

(*t*) Bracton, 159, A.; Lib. 3, de Corona, cap. 37. The form of the writ adopted in Ireland is taken from the

first writ of recaption given in the Regist. Brevium.

(*u*) See a full statement of the practice in 2 Fox & Smith, 157.

(*v*) Trench in repl. v. Taaffe, 3 Law Rec. 26, 2nd Ser.

time for the same rent(*w*) pending a replevin suit for the first affords the tenant a much more effectual remedy for the injury by proceeding grounded on the recaption.

Whatever may have been the original object of the Statute(*x*) of 1847, it is now held not only to extend to all chattels capable of being distrained, but to embrace all cases(*y*) of wrongful taking, whether for rent or for any other cause, to which the replevin by writ is applicable, and therefore a replevin by plaint granted by the court is as effectual for every purpose as a replevin by writ out of court.

In order to facilitate the delivery of distresses for rent, it is enacted by the Irish Civil Bill(*z*) Act, 6 & 7 Will. IV. c. 75, s. 7, that the sheriff for the time being for every county in Ireland shall, within ten days after he shall be sworn in as sheriff, depute a sufficient number of persons to act as replevingers in case of distresses for rent, so that there shall be, at least, one such replevinger in every town wherein general sessions of the peace are held: and for every refusal, or neglect to appoint within ten days a sufficient number of persons to act as such replevingers, and also for every month during which there shall not be one such replevinger in each such sessions town, every sheriff shall forfeit and pay the sum of twenty pounds, to be recovered by civil bill by any person who will sue for the same: and the replevingers so to be appointed, shall have authority in the sheriff's name to grant replevins and make deliverance of all distresses, in the manner or form as the sheriff ought to do.

The replevingers under the preceding Act are only empowered to grant replevins and make deliverance of distresses for rent, and their appointments are only valid during the continuance in office of the sheriff making the appointments, and must be renewed by every succeeding sheriff: if the deputy of a former sheriff continue to discharge the duties of replevin clerk without a new deputation, the whole(*a*) foundation of the replevin suit fails, and a prohibition will be granted to re-

Chitty's Pleading, 720, A. and the 2d ed.; Bishop v. Bryant, 6 Car.

1 Hen. III. c. 21, Eng. and Irish. Bourin v. Marshall, 3 B. & 0.

6 & 7 Will. IV. c. 75, s. 7, Irish, repeats so much of the Irish Statute. Car. I. S. 2, c. 25, and 3 Geo. I. as relates to the appointment of replevingers by sheriffs for granting replevin. The English Statute, 1 & 2 Phil.

and Mary, c. 12, s. 3, is analogous to the repealed provisions of the Irish Acts, 10 Car. I. ses. 2, c. 2, s. 3; and 3 Geo. I. c. 3, ss. 3, 4, 5.

(a) Griffiths v. Stephens, 1 Chitty's Rep. 196. The rule for a prohibition appears to have been made upon a ground not mentioned in the conditional order, nor relied on in the affidavits, nor suggested at the time of making the original application.

strain the sheriff from proceeding in such suit in his county court, the sheriff is answerable if any replevinder appointed by him accepts insufficient security for prosecuting the replevin suit, and for returning distress, and the replevinder is liable, in an action at the suit of the sheriff(b), for taking a bond with insufficient sureties: in an action by the assignee of a replevin bond, the defendant pleaded that the bond was taken from him by one J. S. in the name of the sheriff, under pretence that J. S. was duly appointed replevinder, with a traverse(c), and that the sheriff took the bond, on which issue was joined: the court held, that proof of the bond being passed to a person who acted as replevinder, made out a *prima facie* case on the plaintiff's part, and directed him to a verdict in the absence of contradictory evidence.

5. Replevin does not lie at the suit of a debtor for goods taken out of his possession by the sheriff under an execution issued from the superior courts, and if an attempt were made by the debtor to get back his goods by replevin, the Court would punish such interference(e) with their jurisdiction, because goods in the sheriff's hands are placed in custody of the law, and if they were to be restored by replevin to the party on whom the money was to be levied, the course of justice would be impeded: but if a sheriff's officer having(f) an action against A, undertakes to execute it on goods in the possession of A, the latter may proceed by replevin; and if goods are taken from the possession(g) of a servant under an execution against him, replevin lies at the suit of the owner of the property. Goods taken under an execution issued by an inferior court(h) may be got back by replevin, because the inferior jurisdiction being restrained within its proper limits, the person making the caption is bound to show he took the property within those limits, and that the Court did not exceed its authority in awarding the execution. Goods seized by force of a writ of *habere facias* on a civil bill decree which must pass through the sheriff's hands, and is, in fact, an execution, cannot be replevied by the party or his assignee, as the money is to be levied, as he cannot be suffered to try over again in replevin the same question which was decided in the original action, but the Queen's Bench refused to quash a replevin issued for the

(b) *Bowdon v. Hall*, 7 Jurist, 579; *Sutton v. Waite*, 8 Moore, 27.

(c) *Faulkner v. Johnson*, 11 Mees. & W. 581.

(d) *Gilb. Repl. by Hunt*, 154.

(e) *The King v. The Sheriff of Leicester*, 1 Barnard, 110; *Cawthorne v. Campbell*, 1 Anstr. 205, 212, note.

(f) *Thompson v. Button*, 14 John-

son's Amer. Rep. 84; *Judd v. Cowen's Amer. Rep.* 259.

(g) *Clarke v. Skinner*, 20 J. Amer. Rep. 465.

(h) *Gilb. Repl. by Hunt*, 154.

(i) *Coote v. Gorman*, 3 Law Rep. 58; and see *Winnard v. Foster*, 1190.

such goods by a third person, who claimed them, as being ex-
his own property.

re distress and sale of goods, in nature of an execution, are
Statute, it has been assumed in many cases(*j*), that the lega-
seizure under the warrant of a justice of peace, cannot be
ed in replevin, unless the Statute recognizes such a remedy(*k*)
g a general form of avowry. This subject has lately been
under the consideration of the English Exchequer(*l*), when it
ided, that either replevin or trespass will lie, if the magistrate
urisdiction, and that he must stand in the same situation as an
wrong-doer, unless by pleading he discloses a good defence.
of justice are often unwilling to quash replevins involving im-
legal questions(*m*) upon a summary application, and prefer
the party to avail himself of such matters of defence(*n*) by his
avowry.

levin lies for chattels seized under the warrant of commis-
authorized to levy rates(*o*) for local purposes, and where a dis-
rrant was granted against a person for poor-rates in respect of
ich he did not occupy, a replevin(*p*) was allowed.

laid down by Chief Baron Comyns(*q*), that replevin lies
the King for goods in his hands; but the authority referred to
lates to replevins issued during the reign of Charles I., for
ized for tonnage and poundage, and the writs were probably
to the officers employed in levying the tax: it was settled(*r*),
ce, that replevin does not lie against the King, nor where the
a party, nor where the caption is made in right of the King,
) leave be obtained for that purpose from the Court of Exche-

ilson v. Weller, 1 Bro. & B.
oore, 294, S. C.; Hutchins v.
s, 1 Burr. 579-588; Aylesbury
r, 3 Lev. 204; Rex v. Monk-
Stra. 1184; Bradshaw's case,
Replevin, C.; and see the note
n v. Roberts, Willes, 672.

etcher v. Wilkins, 6 East, 287;
v. Marshall, 3 B. & Adol. 440,
enterden.

orge v. Chambers, 11 Mees. &
Gilb. Repl. by Hunt, 154.

yndal v. Reade, Smith & B.
son v. Weller, 8 Taunt. 521;
71; 1 Bro. & B. 57; 3 Moo.
scaden v. Stewart, 1 Irish Law
; Farrell v. Beresford, 1 Ball
; Pritchard v. Stephens, 6 T. R.
iton v. Boyle, 2 New Rep. 399.

(*n*) Year Book, 38 Edw. III. fo. 3,
A.; Winnard v. Foster, 2 Lutw. 1190.

(*o*) Attorney General v. Brown, 1
Swa. 304; Pritchard v. Stephens, 6 T.
R. 522.

(*p*) Sabourin v. Marshall, 3 B. &
Adol. 440; Fawcett v. Fowles, 7 B. &
Cr. 398; 1 M. & Ry. 102; Milward v.
Caffin, 2 W. Bla. 1351; Fenton v. Boyle,
2 New Rep. 399.

(*q*) Com. Dig. Replevin, D.; 3 Rush-
worth, 1361.

(*r*) Year Book, 3 Hen. VII. fo. 19,
B.; Bro. Abr. Replevin, pl. 33; Gilb.
Replevin, by Hunt, 155; Rex v. Oliver,
Bunb. 14.

(*s*) Gartlan v. Kirkpatrick, Hayes &
J. 57.

quer ; nor can replevin be supported for goods seized for penalties under the Mutiny Acts, nor under the Acts for the collection of the customs, or excise, or of any duties payable to the Crown, nor for goods distrained for quit-rent, or any other rent issuing out of lands, for the use of the Sovereign.

6. Replevin lies only for goods and chattels, and cannot be maintained for things(*t*) affixed to the freehold ; but as replevin is the proper remedy for trying the legality of any(*u*) distress for rent, growing crops distrained under(*v*) the Irish Statute, 56 Geo. III. c. 88, may be replevied. Charters, or deeds relating to(*w*) the inheritance in land, cannot be recovered in replevin, as they descend to the heir, and are not, in law, esteemed chattels ; nor does replevin lie for chattels taken in a foreign country(*x*), though afterwards brought into this realm, because the possessor might have a right to retain them according to the law of the country from whence they were removed, and because the claimant(*y*) never was possessed of the goods within the jurisdiction.

7. Replevin lies for chattels in which a person has only a qualified property, as well as for those in which his property is absolute. Goods deposited for safe keeping, or for the purpose of being delivered(*z*) to another, and wrongfully taken out of the possession of the party to whose care they were intrusted, may be got back by replevin at his suit, as he has a right to the possession against every body but the absolute owner ; this action, however, is only maintainable for goods which are *taken*, and not where they have been delivered upon a contract ; and hence goods delivered to a carrier(*a*) to be conveyed, and detained by him for a general balance ; or goods delivered to a person for safe custody(*b*), are not recoverable by the owner in this mode of proceeding.

Persons having a joint-interest(*c*) in cattle or goods distrained may join in replevin : but where the interest in the property is several, the parties must sever(*d*) in their replevins ; if a landlord distrain cattle belonging to tenants having separate holdings, at rents payable by them

(*t*) *Niblet v. Smith*, 4 T. R. 504.

(*u*) *Lindon v. Hooper*, 1 Cowp. 417.

(*v*) 56 Geo. III. c. 88, s. 15, Irish ; 11 Geo. II. c. 19, s. 8, English.

(*w*) Year Book, 4 Hen. VII. fo. 10, pl. 4 ; Bro. Abr. Replevin, pl. 34 ; Gilb. Repl. by Hunt, 156.

(*x*) *Nightingale v. Adams*, 1 Show. 91.

(*y*) See the note to *Shannon v. Shannon*, 1 Sch. & Lef. 325.

(*z*) Gilb. Repl. 151 ; 2 Ro. Abr. 430, Replevin, A. pl. 1 ; Co. Litt. 145, B.

(*a*) *Galloway v. Bird*, 4 Bing. 299 ; 12 Moore, 547 ; Chamberlain, *ex parte*, 1 Sch. & Lef. 322.

(*b*) See a plea to this effect in replevin, in Rastell's Entries, 569, A.

(*c*) *Slingsby's case*, 5 Rep. 19, A.

(*d*) Year Book, 3 Hen. IV. fo. 16, pl. 9 ; Gilb. Repl. 153 ; Co. Litt. 145, B.

ely, each tenant must issue a replevin for his own property, as has no right to seek(e) redress in his own name, for an injury to be done to another; and it is a good plea in replevin, that the goods taken belong to the plaintiff(f), and to a stranger, or that the joint property of plaintiff and of defendant(g); or if there be several plaintiffs, that the property only belongs(h) to one of them. If goods which were taken away from a testator in his life-time, *conspicue* in the hands of the wrong-doer(i), replevin may be brought by the executor for recovery of the specific chattels. If a *feme-sole* be distrained, and she afterwards marry, and, in his own name alone(j), may maintain replevin, as the right vests in him by the marriage; or both husband and wife may bring the action, if a sufficient reason(l) appear by the declaration to bring her in the suit: if goods which belonged to a *feme-sole* are distrained after her marriage, the husband alone should replevy; but if she brings the suit, it will be presumed, after verdict, that the goods were distrained prior to the marriage. A *feme-sole* plaintiff in replevin, having married after plaint filed in the inferior court, the court removed the suit by *recordari*, and it was ruled(m), that the husband's marriage might be pleaded in abatement of the action in the court. If goods be taken by one person, by the authority(n) or authority of another, a replevin may be sued out against both, or either. Goods distrained for rent may be replevied at any time(o) before the sale, though more than fifteen days have been suffered to elapse since seizure; but the sheriff will be restrained by prohibition(p) from proceeding to replevy goods, after the regular time for sale of the goods had arrived, and the property had been actually sold. By the common law, it was the duty of the sheriff in replevin, as in every other action, to take pledges(q) for the prosecution of the parties who were liable to be amerced for the claim (*pro falso clamore*)

1. Repl. 153.

Litt. 145, B.; Year Book, 3 Edw. 16, pl. 9; Gilb. Repl. 163. *Wes v. Morris*, 2 Jebb & S. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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Mason v. Dixon, W. Jones, 10 B. 167; *Wheatley v. Lane*, 1 B. 7, note 1; Bro. Abr. Reple-

n and Wife v. Mattaire, Cases in Error, 119; 1 Selw. N. P. 293, *Inner v. Milner*, 3 T. R. 627. *Wickborn v. Greaves*, 2 Lev. 107. *Es v. Dodd*, 2 New Rep. 405.

(m) *Hollis v. Freer*, 2 Bing. N. C. 719; 3 Scott, 284; and see *Eubanke v. Owen*, 3 Ad. & Ell. 298; 6 Nev. & M. 799.

(n) 2 Ro. Abr. 431, Repl. D.; Gilb. Repl. 152.

(o) *Jacob v. King*, 3 Taunt. 451; 1 Marsh. 135; *Price v. Ginkins*, 2 Barnard, 415.

(p) *Griffiths v. Stephens*, 1 Chitty's Rep. 196.

(q) *Hussey v. More*, Cro. Jac. 414; *Tregose v. Wennel*, Cro. Car. 594; Gilb. Replevin, 95.

preferred by the plaintiff, if it proved unsuccessful : but such pledges or sureties being only bound in a very small sum, the practice soon degenerated into mere matter of form.

By the Statute(s) Westminster the Second, it is provided that sheriffs or bailiffs shall not only receive of the plaintiff pledges for the pursuing of the suit, before they make deliverance of the distress, but also for return of the beasts, if return be awarded ; and if any take pledges otherwise, he shall answer for the price of the beasts : and the lord that distraineth shall have his recovery by writ, that he shall restore unto him so many beasts or cattle, and if the bailiff be not able to restore, his superior shall restore.

The sheriff may take a bond, under this Statute, from pledges or sureties, conditioned that the party replevying shall appear at the next county court, and prosecute his suit with effect, and make return(t) of the distress, if return be awarded, or the sheriff may, at his discretion, take a bond from the claimant alone, with a similar condition, because the sheriff is answerable in damages if he omit(u) to take pledges, or if the security he accepts prove insufficient. If the replevin be by writ out of Chancery, returnable into the King's Bench or Common Pleas, the condition of the bond should be made conformable to the exigency of the writ. A bond taken under this Statute is not invalidated by the insertion(v) of a condition to save the sheriff harmless ; but any bond given to indemnify the sheriff for doing any act inconsistent with his duty, is utterly void. A bond under this Statute is not assignable, and an action on such bond must be brought in the name of the sheriff.

10. By the Irish Statute(w), 8 Geo. I. c. 9, it is enacted, that all seneschals, stewards, judge, or judges, officer, or officers of inferior courts, having lawful power to grant, or issue out replevins, are required to take, in his or their names, from the plaintiff or plaintiffs in replevin, a bond with sufficient sureties for prosecuting the suit, and also for returning of the goods and chattels so replevied, if a return be awarded, before he or they make deliverance of the distress : and the the seneschals, stewards, judge, or judges, officer, or officers of suc

(r) In the old books "pledges" are synonymous with sureties ; *Blackett v. Crissop*, 1 Ld. Raym. 278 ; and see the reporter's note to *Evans v. Brander*, 2 Hen. Bla. 550.

(s) 13 Edw. I. c. 2, s. 3, English and Irish.

(t) *Rous v. Patterson*, 16 Vin. Abr. 399, Pledges, H. pl. 4. ; *Patterson v. Prowse*, cited 2 H. Bla. 30 ; Bull, N.P.

60 ; 2 Co. Inst. 340 ; Gilb. Replevi by Hunt, 97.

(u) *Moyser v. Gray*, Cro. Car. 446

(v) *Blackett v. Crissop*, 1 Ld. Raym. 279 ; *Morgan v. Griffith*, 7 Mod. 327 ; *Short v. Hubbard*, 2 Bing. 349 ; *Moore*, 667.

(w) 8 Geo. I. c. 6, ss. 5 and 6, Irish ; there is no corresponding English Act

ferior courts, at the request and costs of the avowant or defendant in such action or suit, shall assign to the avowant or defendant in such action or suit, such bond taken from the plaintiff in replevin, by endorsing the same, under his or their hands and seals, in the presence of two or more credible witnesses: and if such bond be forfeited, the avowant or defendant in such action or suit, after such assignment made, may bring an action in his own name, and proceed to judgment and execution thereupon.

This Statute being a remedial, and a very beneficial law, though it only specifies seneschals, and persons having a local or limited authority, and does not expressly name sheriffs, or persons having general authority to grant replevins, yet the general words have been construed sufficient(x) to include sheriffs, and its provisions are extended to all replevins, and are not confined to replevins of distresses taken for rent; and every replevin bond, under this Statute, is rendered assignable to the avowant or defendant.

11. For the purpose of affording a more effectual remedy against vexatious replevins of distresses for rent, it is enacted by the Irish Statute(z), 36 Geo. III. c. 38, that all sheriffs, and other officers having authority(a) to grant replevins, shall in every replevin of a distress for rent(b), take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond(c) in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses, not interested in the goods or distress, and which oath the person granting such replevin is required to administer), and conditioned for prosecuting the suit with effect(d), and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of such distress: and that such sheriff, or other officer taking any such bond, shall at the request and costs of the avowant, or person making conusance, assign(e) such bond to such avowant or person, by endorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses: and if the bond so taken

(x) *Harding v. Lyhane*, 2 Fox & Sm. 50.

(z) 36 Geo. III. c. 38, Irish; 11 Geo. II. c. 19, s. 23, English.

(a) This clause embraces writs of replevin out of Chancery; *Caithness v. Murphy*, Smith & B. 1.

(b) Rentcharges are within this Statute; *Short v. Hubbard*, 2 Bing. 349.

(c) The bond should be joint and several, *Austen v. Howard*, 7 Taunt. 28.

(d) Means "with success;" *Perreau v. Bevan*, 5 B. & Cr. 300.

(e) By the Statute 5 Geo. IV. c. 41, any replevin bond, or the assignment of such bond, are exempted from stamp duty.

and assigned be forfeited, the avowant, or person making conusance, may bring an action, and recover thereupon in his own name: and the Court, where such action shall be brought, may, by a rule of the same Court, give such relief to the parties upon such bond, as may be agreeable to justice and reason(*f*), and such rule shall have the nature and effect of a defeasance to the bond.

The sheriff should require a joint and several bond(*g*) to be executed by the party replevying, under this Statute(*h*), together with two responsible sureties in double the estimated value of the goods distrained, conditioned to prosecute the suit with effect, and without delay, and duly to return the distress in case a return should be awarded. A stipulation for the indemnity of the sheriff against all damages he shall sustain by reason of granting the replevin, is usually inserted in the condition, and will not vitiate(*i*) the bond; but no additional security is afforded to the sheriff by such provision. A sheriff is liable to an action for refusing(*j*) to grant a replevin on a plaint, or to grant his warrant on a Chancery replevin, where sufficient sureties are tendered to him for return of the distress. Growing crops cannot be considered goods and chattels, but being liable to a distress for rent, they are capable of being replevied, and their value(*k*), at the time of replevying, must be estimated, and double the amount of such estimate must be included in the replevin bond.

This Statute(*l*) is confined in its operation to distresses taken for rent, or for a rentcharge(*m*), and is not applicable to distresses taken damage-*feasant*, or for other causes. The Irish Statute 8 Geo. I. c. 6, extends to every case of distress for rent, or for damage-*feasant*(*n*), or for other matters, and does not fix the number of sureties, or prescribe any mode of measuring the sum to be inserted in the replevin-bond. The sheriff, however, in granting or executing replevins, should, in every instance, pursue the directions of the 36 Geo. III. c. 38, because a security taken under this Act will be effectual under the prior Statute, and if defective under the 36 Geo. III. c. 38, may be sustained under the more general terms of the earlier Act, for both Statutes are

(*f*) O'Beirne v. Greene, 2 Jebb & S. 582.

(*g*) Austen v. Howard, 7 Taunt. 28; 2 Marsh. 252, S. C.

(*h*) 36 Geo. III. c. 38, Irish; 11 Geo. II. c. 19, s. 23, English.

(*i*) Short v. Hubbard, 2 Bing. 349; 9 Moore, 667; Dunbar v. Dunn, 10 Price, 54; Caithness v. Murphy, Smith & B. 1.

(*j*) Sabourin v. Marshall, 3 B. &

Adol. 440.

(*k*) Pigott v. Birtles, Tyrw. & Gr. 740; 1 Mees. & W. 450; Glover v. Coles, 1 Bing. 6; 7 Moore, 231.

(*l*) 36 Geo. III. c. 38, Irish.

(*m*) Short v. Hubbard, 2 Bing. 349; 9 Moore, 667.

(*n*) Harding v. Lyhane, 2 Fox & Sm. 160-165; but see Caithness v. Murphy, Smith & B. 11.

the benefit of the party distraining, and are not inconsistent with each other. A bond executed only(*o*) by the party replevying, with one(*p*) surety, or in a sum less(*q*) than double the value of the distress, though not conformable to the 36 Geo. III. c. 38, yet enforceable under the 8 Geo. I. c. 6, may be enforced by the sheriff or his assignee, under the latter Statute. Where the replevin bond is only executed by one surety, it was insisted that the sheriff should recover more than a moiety of his demand from such surety(*r*), on any reason of the sheriff's negligence, in not requiring a second surety, the benefit of contribution had been lost. The case of *Howard* ended in a compromise(*s*), at the suggestion of the court. But it is to be observed, that the Statute requires two sureties for the purpose of dividing the responsibility between them, to secure the benefit of the avowant. A replevin bond with three sureties is equally valid and effectual under either of the Statutes.

It has been contended, that a sheriff is not authorized to *assign* a bond founded on a replevin(*u*) sued out of Chancery, either by the 36 Geo. III. c. 38, which is restricted to sheriffs and other officers having authority to *grant* replevins, or of the 8 Geo. I. c. 6, which contemplates officers having power to grant or issue replevins. Neither of these Statutes could apply to original writs of replevin, which are only executed, and not granted by the sheriff, but it is said that bonds founded on Chancery replevins are assignable under the 36 Geo. III. c. 38, and the Court declined giving any opinion on either the 8 Geo. I. c. 6, warranted the assignment of a bond founded on a Chancery replevin under that Statute: it may be deserving notice, that the term "replevin" is very often used to signify the writ or warrant, by means of which a distress is restored to the party. A landlord distraining for rent is not obliged to accept an assignment of a replevin bond(*v*) from the sheriff, unless it be framed in conformity with the provisions of the 36 Geo. III. c. 38, but if the bond become valid although the provisions of the Statute be not accurately ob-

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| <i>Metz v. Crissop</i> , 1 Ld. Raym. | by Best, J. |
| <i>Went v. Gordon</i> , 3 Tyrw. 107; | (<i>s</i>) <i>Austen v. Howard</i> , 7 Taunt. 327; |
| <i>Mees</i> . 58, S. C.; <i>Austen v.</i> | 1 Moo. 68. |
| <i>Marsh</i> . 352; 7 Taunt. 28— | (<i>t</i>) <i>Harding v. Lyhane</i> , 2 Fox & Smith, |
| | 160. |
| <i>Evans v. Brander</i> , 2 H. Bla. | (<i>u</i>) <i>Caithness v. Murphy</i> , Smith & |
| | <i>Batty</i> , 1; <i>Igoe v. O'Hara</i> , 1 Jebb & Symes, |
| | 443; 1 Irish Law Rep. 155, S. C. |
| <i>Went v. Howard</i> , 7 Taunt. 28— | (<i>v</i>) <i>Harding v. Lyhane</i> , 2 Fox & Smith, |
| <i>Marsh</i> . 352; 1 Moo. 68; and | 160. |
| <i>v. Cooper</i> , 2 B. & Ald. 440, | |

served, the sheriff may proceed against the principal or sureties in his own name, to recover compensation for any loss he shall have sustained, not exceeding the penalty of the bond, and he may have recourse to the prior Statutes(*w*) on the subject, in order to support his security. A replevin bond is not invalidated or made incapable of assignment, either by omitting to insert a condition(*x*) that the writ shall be prosecuted without delay, or by introducing a stipulation to save(*y*) the sheriff harmless.

12. It is the duty of the sheriff(*z*), when required, to assign the replevin bond, if the party replevying has not complied with its conditions, and as the replevin may, at the option of the person replevying, be directed to the party causing the distress to be made, and to his bailiff jointly, or to either of them separately, the bond may be assigned either to the avowant or to his bailiff, or the person making conuzance, who in such case should sue jointly, or to the avowant alone(*b*), although the bailiff be joined in the suit, or to the bailiff(*c*) or defendant in replevin alone, when the principal(*d*) is not joined, but it has not been settled whether an assignment of the bond solely to the person making conuzance can be maintained, when the principal is made a party to the replevin. If the bailiff be made the only defendant in the suit(*e*), the bond cannot be assigned to the principal, but if an action be brought in the bailiff's name, with his permission, against the sheriff for taking insufficient pledges, and the bailiff, without the privity of his principal, release(*f*) the sheriff, the Court will, on application, prohibit the release from being set up against the landlord's claim.

Although the replevin suit be determined in the county court, an action on the replevin bond must be instituted in one of the superior courts(*g*), but an action on a replevin bond founded on a civil bill in replevin must be brought in the court of the assistant-barrister(*h*), and lies against any obligor resident within the jurisdiction in the name of the assignee of the bond. Any person authorized to grant replevins is qualified to take a replevin bond, and an assignment of the bond

(*w*) 13 Edw. I. c. 2, s. 3, Statute of Westminster 2, Eng. and Ir.; 8 Geo. I. c. 6, Irish.

(*x*) Dunbar v. Dunn, 10 Price, 54.

(*y*) Caithness v. Murphy, Smith & B. 1.

(*z*) Mendez v. Bridges, 5 Taunt. 325.

(*a*) Phillips v. Price, 3 M. & Selw. 182; Archer v. Dudley, 1 Bos. & Pull. 381, note; Mounson v. Redshaw, 1 Saund. 195, f. note I.

(*b*) Archer v. Dudley, 1 Bos. & P. 382, note.

(*c*) Dias v. Freeman, 5 T. R. 195.

(*d*) Page v. Eamer, 1 Bos. & Pull. 378.

(*e*) Page v. Eamer, 1 Bos. & P. 381

(*f*) Hickey v. Burt, 7 Taunt. 48.

(*g*) Dias v. Freeman, 5 T. R. 195.

(*h*) Bentley v. Hastings, 6 Irish Law Rep. 170.

(*i*) Thompson v. Farden, 1 Mann. & Gr. 535; 1 Scott, N. R. 275; 8 Dowl. Pr. C. 615.

under the office seal, though not signed either by the sheriff or under-sheriff, but by a person(*j*) accustomed to transact business in the sheriff's office, has been deemed valid.

13. The condition of the bond to prosecute the suit with effect, means that it shall be prosecuted with final success, and extends(*k*) to all the proceedings in the cause from its commencement to its termination, as well in the sheriff's court, as in the superior courts; and even where the bond was conditioned to appear in the county court, and then and there to prosecute with effect, it was ruled that the words 'then and there' related(*l*) only to so much of the suit as should be prosecuted in the county court, and the plaintiff in replevin having failed in the superior court, to which the cause had been removed, that the bond was forfeited. The conditions of the bond, to make a return of the goods distrained, if so adjudged, and also to prosecute the suit with effect and without delay, are distinct and independent, and the bond(*m*) becomes forfeited by a failure in either, and it is not requisite to negative(*n*) both parts of the condition in order to sustain the action: on a replevin bond conditioned that the party replevying should appear at the next county court(*o*), and then and there prosecute his suit with effect, a breach assigned by the declaration pursuing the words of the condition was deemed sufficient, as the party replevying, in order to comply with the terms of the condition, must not only appear, but file his declaration(*p*) at the next county court, unless the suit be previously removed by *recordari*: the defendant having pleaded to a declaration on the bond, that he had appeared at the next county court and prosecuted his suit with effect, which was then depending and undetermined(*q*), a demurrer to the plea was overruled, as the plaintiff was bound to shew by his replication how the suit had been determined. Upon a similar plea, in an action against a surety to the bond, an agreement(*r*), which was made a rule of court between the plaintiff

(*j*) *Middleton v. Sandford*, 4 Campb. N. P. C. 36; *Harris v. Ashby*, 1 Selw. N. P. 583, note; but see *Kitson v. Fagg*, Stra. 60; 10 Mod. 288.

(*k*) *Perreau v. Bevan*, 5 B. & Cress. 284; 8 D. & Ry. 72; *Turnor v. Turner*, 2 Brod. & B. 107; 4 Moo. 606; *Morgan v. Griffith*, 7 Mod. 381; *Chapman v. Butcher*, Carth. 248; *Gwillim v. Holbrook*, 1 Bos. & P. 410.

(*l*) *Vaughan v. Norris*, Cases, temp. Hardw. 137.

(*m*) *Perreau v. Bevan*, 5 B. & Cress. 284; 8 D. & Ry. 72; *Dunbar v. Dunn*, 10 Price, 54; *Moore v. Bowmaker*, 7

Taunt. 103; *Igoe v. O'Hara*, 1 Irish Law Rep. 155; 1 Jebb & S. 443.

(*n*) *Dunbar v. Dunn*, 10 Price, 54; but see *Phillips v. Price*, 3 M. & Selw. 183; *Mounson v. Redshaw*, 1 Saund. 195, g. note m.

(*o*) *Dias v. Freeman*, 5 T. R. 195.

(*p*) *Seal v. Phillips*, 3 Price, 17.

(*q*) *Brackenbury v. Pell*, 12 East, 385; and see *Jackson v. Hanson*, 8 Mees. & W. 477; *Morris v. Matthews*, 2 Q. B. Rep. 293; 1 G. & Dav. 677.

(*r*) *Hallett v. Mountstephen*, 2 D. & Ry. 343.

in an action on the bond and the party replevying, to stay all proceedings in the replevin suit upon payment of a stipulated sum of money, and that each party should abide his own costs, was held admissible evidence to negative the allegation in the plea, that the replevin suit was then depending and undetermined, and the surety was held liable for such sum as should be found due for the rent in arrear.

In an action on the bond for not prosecuting the suit with effect and without delay, it appeared(*s*) that the party replevying had filed his plaint in the sheriff's court, but that no further step was taken by either party for two years prior to the commencement of the action on the bond, and it was decided that the party replevying had not prosecuted his suit without delay, and that the bond was forfeited, though no judgment of *nonpros* was entered, and it was observed, that *Brackenbury v. Pell*(*t*) was upon demurrer and not after verdict. If a party replevying do not use due diligence in prosecuting his suit, he is guilty of a breach(*u*) of that part of the condition of the replevin bond which requires the prosecution of the suit without delay, even though it should appear that the suit is not determined, but if the breach assigned be for not prosecuting the suit with effect, it affords a sufficient defence to shew that the suit is still depending.

In an action against sureties, because the replevin suit had not been prosecuted without delay, it was ruled(*v*) that the plaintiff in replevin having entered an appearance to the *recordari* in the superior court, could not be considered guilty of delay, where the defendant in replevin had not caused any appearance to be entered, though such omission proceeded from the default of the sheriff in not serving him with a summons in pursuance of the *recordari*: but upon a Chancery replevin, where the party replevying neglected an opportunity of compelling the sheriff to return the writ, and died(*w*) before the writ was filed, it was decided that the assignment of the replevin bond, after the death of the plaintiff in replevin, and the subsequent proceedings against the sureties, were regular. An abatement of the suit by the decease(*x*) of the plaintiff in replevin, after plaint levied in the sheriff's court, and pending the proceedings, will not occasion a forfeiture of the bond, and

(*s*) *Axford v. Perrett*, 4 Bing. 586; 1 Moo. & P. 470; and see *Walker v. Finucane*, 4 Law Rec. 91.

(*t*) *Brackenbury v. Pell*, 12 East, 385.

(*u*) *Harrison v. Wardle*, 5 B. & Adol. 146; 2 Nev. & Mann. 703, S. C.; *Rider v. Edwards*, 3 Mann. & Gr. 202.

(*v*) *Harrison v. Wardle*, 5 B. & Adol.

146; 2 Nev. & Mann. 703, S. C.; see *Ward v. Creasey*, 2 B. Moore,

(*w*) *White v. Murphy*, 1 Huds. & 498.

(*x*) *Duke of Ormond v. Bierley*, Carr 519; 12 Mod. 380; *Cases temp. Ho* 127; *Morris v. Matthews*, 1 Gale & 677; 2 Q. B. Rep. 293.

in like manner where the suit was removed into a superior court, and the plaintiff in replevin died, after declaration and before avowry(*y*), the court ruled that a return of the goods ought not to be awarded.

14. Neither principal nor sureties(*z*) can be held to bail in an action on the replevin bond, and though the defendant in replevin accepts an assignment of the bond, and sue both principal and sureties, yet if they are found to be insolvent or insufficient, the parties interested will not be precluded from their remedy(*a*) by action on the case against the sheriff or undersheriff(*b*), for taking insufficient sureties. The avowant, by executing a writ of inquiry, and obtaining judgement for the arrears of rent under the Statute(*c*) 7 Will. III. c. 22, is not restricted to his execution under that Act, but may proceed on an assignment(*d*) of the replevin bond, or against the sheriff for taking insufficient sureties, as the statutable remedy is cumulative. In cases of distress for rent, it is not requisite that any writ *de retorno habendo* should be issued(*e*) for the purpose of enabling the party to maintain an action against the sheriff for taking insufficient pledges, provided judgement of nonsuit or *nonpros* be obtained in the replevin suit, but where the avowant proceeds at common law upon a distress damage-*assant*(*f*), a writ *de retorno habendo* and return of *elongata* must be procured, before any action can be maintained against the sureties, or against the sheriff.

By the Irish Statute(*g*) 8 Geo. I. c. 6, the sheriff is bound, in all cases of replevin, to take a bond with sufficient sureties for prosecuting the suit, and in proceeding under this Statute against the sheriff for neglecting to require security, or for taking insufficient pledges, it does not seem necessary to issue any writ *de retorno habendo* as a judgement(*h*) of *nonpros* works a forfeiture of the bond. If the sheriff has not taken a bond pursuant to the Statute, or has lost(*i*) the bond which he had obtained, or if the sureties be insufficient, he will be answerable in an action on the case for such negligence or misconduct, but the

(*y*) Cutfield v. Corney, 2 Wils. 83.

(*z*) Duke of Ormond v. Brierly, 1 Balk. 99.

(*a*) Mounson v. Redshaw, 1 Saund. 195, g. note 3.

(*b*) 57 Geo. III. c. 68, s. 3, Irish; and see Richards v. Acton, 2 W. Bla. 1221.

(*c*) 7 Will. III. c. 22, Irish; 17 Car. II. c. 7, English.

(*d*) Perreau v. Bevan, 5 B. & Cress. 284; 8 D. & Ry. 72; Turnor v. Turner,

2 Brod. & B. 107; 4 Moore, 606.

(*e*) Perreau v. Bevan, 5 B. & Cress. 284; 8 D. & Ry. 72, S. C.

(*f*) Hucker v. Gordon, 3 Tyrw. 117; 1 Cro. & M. 58; Combes v. Cole, Cases temp. Hardw. 352.

(*g*) 8 Geo. I. c. 6, s. 5, Irish.

(*h*) Hucker v. Gordon, 3 Tyrw. 117, by Bayley, Baron.

(*i*) Perreau v. Bevan, 5 B. & Cr. 284; 8 D. & Ry. 72.

Court will not order the sheriff to assign(*j*) the replevin bond to ~~the~~ party, nor attach the sheriff for neglecting(*k*) to take such a bond, nor compel him to pay the costs recovered by the defendant in replevin, where the sureties are insufficient(*l*): however, where the sheriff was charged with having improperly(*m*) given up a replevin bond, he was ordered to answer the matter of complaint.

15. The sureties in a replevin bond are not liable(*n*) for any sum exceeding the penalty of the bond, and the costs of the action for its recovery, and the liability of the sheriff for taking insufficient sureties is governed(*o*) by the same rule, because it is not reasonable that the sheriff should be compelled to pay a larger sum than the sureties would be answerable for, if they had proved sufficient, and the expenses of a fruitless action against sureties cannot be recovered from the sheriff, unless he received notice(*p*) of the intention to bring an action. It was a subject of doubt whether the liability(*q*) of sureties was confined to the value of the goods distrained, the costs of the replevin suit, and the costs of the action on the bond, or should be extended to the penalty of the bond to be applied in liquidation of the rent and costs: after a review of the decisions on this question, Patteson, Justice(*r*), held that the penalty of the replevin bond ought only to stand as a security for the value of the distress, if the rent amounts to so much, or for the amount of the rent, if less than the value of the goods distrained and the costs of the replevin suit: if the value of the distress was £100 and the arrear of rent was £20, the penalty should only secure the amount of £20, for otherwise the landlord would be entitled to recover £80 more than was really due. An action brought against sureties(*s*) on the replevin bond will be stayed, upon paying into Court the value of the goods distrained, to be ascertained by the prothonotary, the costs of the replevin suit along with the costs of the action and of the application. A surety may plead that the action on the replevin bond was

(*j*) *Combes v. Cole*, Cases temp. Hardw. 352.

(*k*) *The King v. Lewis*, 2 T. R. 617; *Twells v. Colville*, Willes, 375.

(*l*) *Tesseyman v. Gildart*, 1 New Rep. 292, overruling *Richards v. Acton*, 2 W. Blackst. 1220.

(*m*) *Petrose v. Best*, 1 Barnard, 240.

(*n*) *Jeffery v. Bastard*, 6 Nev. & M. 303, 4 Ad. & Ellis, 823, S. C.; *Heford v. Alger*, 1 Taunt. 218.

(*o*) *Evans v. Brander*, 2 H. Bla. 547; *Baker v. Garratt*, 3 Bing. 56; 10 Moore, 324; *Paul v. Goodluck*, 2 Bing. N. C.

220; 2 Scott, 363, S. C.; but see *Scott v. Waithman*, 3 Stark. N. P. C. 168.

(*p*) *Baker v. Garratt*, 3 Bing. 56; 10 Moore, 324, S. C.

(*q*) *Concanen v. Lethbridge*, 2 Bla. 36; *Evans v. Brander*, 2 H. 547; *Ward v. Henley*, 1 Y. & Jerv. 28.

(*r*) *Hunt v. Round*, 2 Dowl. Pr. 558; *Scott v. Waithman*, 3 Stark. N. P. C. 168; *Yea v. Lethbridge*, 4 C. 433.

(*s*) *Hunt v. Round*, 2 Dowl. Pr. 558; *Gingell v. Turnbull*, 3 Bing. N. C. 881; 5 Scott, 153.

action against the sheriff for not taking sufficient surety of their insufficiency will be required, and in order of inadequacy, it may be proved that they were in debt, and was executed, and had been applied to for payment and their promises to pay, or had declared their inability to engagements: the sheriff will be justified in accepting of apparent responsibility, but if he had reason to know the surety was not responsible from writs passing through, if he neglect the means in his power of informing himself, he will be answerable for such negligence: the precaution of searching for writs against the proposed sheriff's office of the bailiwick in which he resides; but the sheriff, nor his replevin clerk, is bound to leave his purpose of making inquiries on the subject, though they may be, or by the personal attendance and information of the sheriff, be enabled to satisfy a jury that the writs had been used. Damages having been recovered against the sheriff for neglect of duty, in taking such inadequate security, and if that one of the sureties was apparently responsible, the sheriff was held entitled to retain a verdict in his favour.

ies in the bond are competent witnesses(*a*), in an action of replevy, to prove whether they were solvent at the time of the execution of the security ; and a surety, who is a material witness(*b*) in the action, may be removed from the bond, on application to the Court by the party replevying, and from his obligation, in order to restore his competency, and in his place another sufficient surety.

execution of the replevin bond, and deliverance of the dis-
traint has no lien(c), of any description, upon, or

(y) Jeffery v. Bastard, 6 Nev. & Man. 303; 4 Ad. & El. 823, S. C.

(z) *Sutton v. Waite*, 8 Moore, 27;
Bowdon v. Hall, 7 Jurist, 579.

(a) *Mounson v. Redshaw*, 1 Saund. 195.

(b) **Bailey v. Bailey**, 1 Bing. 92; 7 Moore, 439.

(c) *Ward v. Henley*, 1 Yo. & Jerv. 298; *Hefford v. Alger*, 1 Taunt. 218.

power over, the goods which were distrained, and the landlord afterwards distrain the same chattels for rent subsequently a due, without discharging the sureties in the replevin bond entered upon the original distress : the property in the goods replevied exclusively in the tenant, and on his bankruptcy will pass to assignees ; and the sureties in replevin have no equitable remedy against such goods for their own protection or indemnity.

18. The venue, in a declaration on the replevin bond(*f*), laid in any county ; but an action against the sheriff for taking sufficient pledges must be brought in the county where the injury complained of was committed ; and may be commenced(*h*) in any superior courts, though the replevin was returned into a county court.

19. After judgement by default in an action of debt on the replevin bond(*i*), execution may be issued in England without any suggestion of breaches, or inquiry of damages, as the value of the distress is considered to be admitted by the execution of the bond. This practice, however, does not appear to be uniformly(*j*) followed in England ; an inquiry of damages pursuant to the Statute(*k*), is required according to the mode of procedure in Ireland.

20. It is an established rule in Courts of Equity(*l*), that if the creditor, without(*m*) the concurrence of the surety, give time for payment to the principal debtor by express agreement, and not merely by indulgence(*n*), the surety will be discharged, and it is not essential that the surety should show he has been injured(*o*) by such indulgence ; an agreement might have operated to his prejudice ; this doctrine has been fully recognized as applicable, in equity, to the relief of sureties in replevin bonds : goods distrained for rent having been replevied by the landlord and tenant, by their agreement in writing, consequently

(*d*) *Bradyll v. Ball*, 1 Bro. Cha. Ca. 427 ; *Bradyll v. Jones*, 1 Bro. Cha. Ca. 432.

(*e*) *Moore v. Bowmaker*, 6 Taunt. 382 ; 2 Marsh. 82, S. C.

(*f*) *Gregson v. Heather*, 2 Stra. 727 ; 2 Ld. Raym. 1455.

(*g*) By the Irish Statute, 10 Car. I. Sess. 2, c. 16. The corresponding English Acts, 7 Jac. I. c. 5, and c. 21, do not include sheriffs.

(*h*) *Hucker v. Gordon*, 3 Tyrw. 107.

(*i*) *Middleton v. Bryan*, 3 M. & Selw. 155.

(*j*) *Austen v. Howard*, 7 Taunt. 327.

(*k*) 9 Will. III. c. 10, ss. 8 and 9 ; 8 & 9 Will. III. c. 11, s. 8, E. 1.

(*l*) *Rees v. Berrington*, 2 Ves. 540 ; *Samuell v. Howarth*, 3 M. & Cr. 540 ; *Bank of Ireland v. Beresford*, 10 Cl. & F. 233 ; *Mayhew v. C. Swa.* 190, and the notes.

(*m*) *Tyson v. Cox*, Turn. 395.

(*n*) *Eyre v. Everett*, 2 Russ. 100.

(*o*) *Boulton v. Stubbs*, 18 V. 100 ; *Samuell v. Howarth*, 3 Meriv. 100.

(*p*) *Moore v. Bowmaker*, 6 Taunt. 379 ; 2 Marsh. 82 ; *Hallett v. Stephen*, 2 D. & Ry. 343.

matters in dispute between them to arbitration, and that herein contained should prejudice the distress which had been discharge the sureties, and that, pending such reference, *no is should be taken in the replevin suit* : an award being made, authorized the landlord to enter up judgment of “*non pros*,” tion being commenced against the surety upon the bond, a set aside the proceedings was refused, because, as was ob- was no reason for discharging the sureties from their obliga- the party distraining had not pressed his suit with all possible the written agreement giving time to the tenant(*q*) being the surety in bar of the action, a demurrer to the plea was a bill in equity was then exhibited by the surety(*r*), to re- landlord from proceeding on the judgement which had been on the replevin bond, and the Court, after observing, “that not at liberty to inquire whether any prejudice actually re surety, as it was sufficient if what had been done might prejudicial to him, and as no proceedings could have been he replevin suit pending the reference, a material alteration in his situation,” pronounced a decree for a perpetual in-

Where the parties in a replevin suit(*s*) under an order of , referred the cause to arbitration, without the privity of the upon a motion to enter a verdict in favour of the avowant for awarded, the application was refused so far as it affected the however, a plea by sureties to an action on a replevin bond, it that the replevin suit was referred to arbitration, and that rator, without the privity(*t*) of the sureties, enlarged the making his award, was, upon demurrer, held bad, for though instances alleged in the plea might have the effect of dis- the sureties in equity, yet those facts were not pleadable in action.

Observations of Chief Baron Alexander, in his elaborate judg- n Ward *v.* Henley, afford important principles on this sub- : says : “if a replevin cause be referred at the trial, and by of the reference, the jurisdiction of the arbitrator be con- he issue on the record, he could decide only the amount of s at the time of the distress, in the same manner as the jury

re *v.* Bowmaker, 7 Taunt. sh, 392, S. C.
naker *v.* Moore, 3 Price, 114;
3; Daniell, 264.
er *v.* Hale, 4 Bing. 464; 1
285, S. C.; but see Dale *v.*

Gordon, 2 Moo. & Scott, 532, *contrà*.
(*t*) Aldridge *v.* Harper, 10 Bing. 118;
3 Moo. & Sc. 519.
(*u*) Ward *v.* Henley, 1 Yo. & Jerv.
285.

must have done, if the case had proceeded to a verdict: the sureties in the replevin bond would then have no cause of complaint, because their liability could not be altered, the arbitrator being substituted in place of a jury: but if, on the trial of the replevin suit, the tenant and landlord, without the privity of the sureties, agree to refer all matters in difference between them, and by the submission give the arbitrator power not only to decide upon the amount of rent due at the time of distraining, but also authorize him to settle the amount of rent due subsequently to the institution of the replevin cause, in which the sureties have no concern, the liabilities of the sureties would by this means be increased, as the rent awarded by the arbitrators might be composed, in part at least, of rent which became due long subsequent to the period of the original distress."

The grounds of equitable interference in these cases are, that the parties in replevin shall not by their acts, be permitted to enlarge or vary the liability of the sureties, or render them subject to responsibilities, or expose them to difficulties which were not comprehended in the original contract. The landlord by entering into any binding agreement having the effect of preventing him from obtaining a judgment, or issuing execution in the replevin suit at the time allowed by the usual course of the Court, or by withdrawing an execution(*w*) in the replevin cause against the tenant's goods, or by empowering the arbitrator to settle accounts between the landlord and his tenant, involving(*x*) other matters besides the subject of the replevin suit, or by accepting(*y*) a composition from his tenant for the rent in arrear, will exonerate the sureties, but a reference at *Nisi Prius* to ascertain the rent due, merely substituting the award of an arbitrator for the verdict of a jury, and without extending(*z*) the period allowed by the rules of the Court for issuing an execution, or mere negligence(*a*) in prosecuting the replevin suit, will not avoid the security.

Whenever an application was made to Sir Anthony Hart to extend a receiver to a second cause, he always required(*b*) the consent of the receiver's sureties in the first cause, because the Court have no jurisdiction, by extending a receiver without the consent of his sureties in the

(*v*) *Rees v. Berrington*, 2 Ves. Jun. 540; *Barclay v. Jones*, 2 Law Rec. 446.

(*w*) *Mayhew v. Crickett*, 2 Swanst. 191.

(*x*) *Ward v. Henley*, 1 Yo. & Jerv. 285.

(*y*) *Wilson, ex parte*, 11 Vesey, 410.

(*z*) *Hulme v. Coles*, 2 Simons, 12; *Prendergast v. Devay*, 6 Madd. 126. Sir

Anthony Hart observed, that the principle of discharging a surety by the creditor's giving time for payment, was a refinement of a Court of Equity, and that he would not refine upon it; 2 Simon 14.

(*a*) *Eyre v. Everett*, 2 Russ. 381; *Emuall v. Howarth*, 3 Meriv. 278.

(*b*) *Barclay v. Jones*, 2 Law Rec. 44

original cause, to render them answerable for his conduct, or for his administration of the fund in both causes. However, upon a motion at the Rolls to extend a receiver to a second cause, it was suggested by counsel, that the sureties of the receiver would be discharged, unless their recognizance was renewed; but Sir Michael O'Loghlen(c) observed, though he had entertained such an opinion, yet finding that a contrary practice had so long prevailed, he would not introduce any alteration on the subject. If sureties in replevin be discharged by any act of the landlord, or avowant, the sheriff will, by such means(d), be relieved from any liability to action for taking insufficient sureties, as it is not equitable that the creditor should be suffered to deprive the sheriff of his remedy against the sureties, and yet hold him answerable for their insufficiency.

By the Irish Act(e), 36 Geo. III. c. 38, courts of law are authorized, on motion, to give such relief to the parties upon the replevin bond as may be agreeable to justice and reason: after judgement for the landlord in a replevin suit, the tenant obtained an injunction in equity to restrain the proceedings at law, on the terms of bringing the arrear of rent into Court: the injunction being afterwards dissolved, an order was made, on consent(f), that the landlord should receive the money so lodged, and that the tenant should pay the costs in equity within a fortnight after taxation, together with the further sum of £115, and that on payment of such sums all further proceedings at law between the parties should cease: the sureties in the replevin bond were not parties to the consent, and upon motion to set aside proceedings subsequently taken against them on the bond, the Queen's Bench ordered the suit to be stayed, holding that the sureties were discharged in consequence of the time for payment given to the principal by the consent order.

21. The assignee of a replevin bond having brought separate actions against the principal and his two sureties, it was ordered(g) that the proceedings in all the actions should be stayed on payment of the rent and costs, and in case of default, that the first action alone should be prosecuted, the defendant in the other two actions submitting to be bound by the result of the action against the principal.

(c) *Parker v. O'Brien*; *La Touche v. O'Brien*, 25th Nov. 1837, at the Rolls, MSS.

(d) But see *Dale v. Gordon*, 2 Moore & Scott, 532; 3 Moo. & Sc. 339.

(e) 36 Geo. III. c. 38, Irish; 11 Geo.

II. c. 19, s. 23, English.

(f) *O'Beirne v. Greene*, 2 Jebb & S. 582.

(g) *Bartlett v. Bartlett*, 4 Mann. & Gr. 269; *Miers v. Lockwood*, 9 Dowl. Pr. Ca. 975.

CHAPTER V.

REPLEVIN.

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| 22. <i>Delivery of Distress by the Sheriff.</i> | 28. <i>Or for more Cattle than were taken</i> |
| 23. <i>Claim of Property.</i> | 29. <i>Specification of Chattels seized.</i> |
| 24. <i>Removal of Proceedings by recordari.</i> | 30. <i>The Goods must be claimed as Plaintiff's Property.</i> |
| 25. <i>Procedure on Return of recordari or Replevin.</i> | 31. <i>Matter of Aggravation need not be denied.</i> |

PLEADINGS.

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| 26. <i>Venus and Statement of "locus in quo."</i> | 32. <i>Pleas in Abatement.</i> |
| 27. <i>Declaration for fewer Cattle than were distrained.</i> | 33. <i>Non cepit, and other Pleas to the Declaration.</i> |
| | 34. <i>Pleading double Matter.</i> |
| | 35. <i>When Security for Costs required</i> |
| | 36. <i>When Proceedings in Replevin stayed, or discontinued.</i> |

22. THE party replevying and his sureties having executed the replevin bond, the sheriff issues his precept or warrant to his bailiff, gives him(*a*) verbal directions to replevy the goods distrained, and where the proceeding is by plaint, causes a summons(*b*), to be served on the person distraining, requiring him to appear at the next court to answer the plaintiff in a plea of taking and unjustly detaining his goods. If the distress be not restored after demand made by the bailiff, the sheriff may break open(*c*) the outer door of a house, or the gate(*d*) of any enclosure in his bailiwick, where the goods have been placed, for the purpose of delivering them to the claimant. In a plea of justification to an action of trespass for seizing cattle, the sheriff is not bound to allege that the cattle replevied by him were the property, or in the possession of the party replevying.

Upon a return made to the sheriff's warrant by the bailiff, that the goods were eloigned, or removed to places unknown to him, the sheriff should hold an inquest of office in his county court to ascertain the fact, and if found to be true, he should issue(*f*) his precept in nature of a writ of *withernam*, commanding his bailiff to seize goods belonging to the persons so distraining, in lieu of those which were eloigned.

(*a*) 2 Co. Instit. 139.

(*b*) Gilb. Replevin, by Hunt, 101.

(*c*) By Stat. Westminster the First, 3 Edw. I. c. 17, Engl. & Irish; 2 Instit. 193 and 194; Semayne's case, 5 Rep. 93, A.

(*d*) Year Book, 8 Hen. IV. fo. 19, 4; Bro. Abr. Replevin, pl. 17.

(*e*) Milles v. Davies, 2 Comyns's R. 590.

(*f*) Gilb. Repl. 116-119; 1 Bro. Gouldsb. 167.

If the sheriff make a return to a chancery replevin, that the distress has being eloigned by the distrainer, a writ of *withernam* issues out of the court into which the replevin is returnable, by which the sheriff is commanded to take goods or cattle of the distrainer to the value of the chattels disirained, and to cause them to be delivered to the plaintiff in replevin, until the property originally distrained should be restored. The proceeding in *withernam* is in nature(*g*) of a punishment for the illegal conduct of the distrainer, and therefore replevin will not lie(*h*) for goods taken in *withernam*, until the original distress be forthcoming. The proceeding in *withernam* is altogether obsolete, because the landlord, by submitting to the replevin, is sure of obtaining an adequate remedy for recovery of his rent.

23. A question of property cannot be entertained(*i*) in the county court without the King's writ for that purpose; and therefore if a defendant in replevin make a claim of property to the sheriff, or his bailiff, in the chattels sought to be replevied, the sheriff's authority, whether the replevin be by plaint or by writ, is suspended until a writ(*j*) "*de proprietate probandâ*" be issued, empowering the sheriff to hold an inquest of office, for the purpose of ascertaining whether the goods are the property of the plaintiff or of the defendant. If the claim of property be made on a replevin *by plaint*, the sheriff should certify(*k*) such claim to have been made by the defendant in person, and thereupon a writ "*de proprietate probandâ*" may be obtained(*l*) out of Chancery; but the more prudent course of proceeding is to remove the suit by *recordari* into the King's Bench or Common Pleas. If the sheriff return a claim of property to a Chancery(*m*) replevin, a judicial writ "*de proprietate probandâ*," directed to the sheriff, will be issued out of the Court into which the replevin was made returnable. If the property in the goods is found for the party replevying, upon an inquest under a writ "*de proprietate probandâ*," the sheriff should cause(*n*) them to be restored; but if the finding be in the defendant's favour, the sheriff's authority to make deliverance is determined, though the plaintiff(*o*) may traverse the finding in the superior court. A claim of property will not be received by the sheriff from a bailiff(*p*), or servant, but must be pre-

(*g*) 3 Bla. Com. 149.

(*h*) Designy's case, Thos. Raym. 475.

(*i*) Gilb. Replevin, 130; Co. Litt. 145, B.

(*j*) Regist. Brev. 83-85.

(*k*) Milles v. Davies, 2 Com. Rep. 590; Co. Litt. 145, B.

(*l*) Gilb. Repl. 130; Hamm. N. P. 411.

(*m*) Ld. St. John v. Saunders, 2 Dyer, 172, B.

(*n*) Gilb. Repl. 131.

(*o*) Bro. Abr. Propertie, plac. 49; Hamm. N. P. 410.

(*p*) Co. Litt. 145, B.; Gilb. Replev. 132.

ferred by the owner himself, or defendant in person, and none but party(*q*) to the replevin is entitled to this writ. An action of trespass cannot be maintained(*r*) against the sheriff, or his bailiffs, for taking goods or cattle by virtue of a replevin, unless the person having possession claims property when the sheriff or his bailiffs come to demand such chattels; but the sheriff will be deemed a trespasser, if he causes the goods to be restored to the claimant, after a claim of property made by the defendant in replevin, in his own proper person. The writ "*de proprietate probandâ*" is seldom resorted to, though where replevin is improperly issued, and the change of possession might be attended with great loss, such a remedy may be adopted with advantage. In ordinary cases it will be more beneficial to the party distraining to insist on his right of property, by plea in the superior court.

24. Replevin suits are usually commenced in Ireland by original writ out of Chancery, made returnable into the King's Bench or Common Pleas, and, when commenced by plaint, are generally removed into the superior courts. Proceedings in replevin are removed out of the county court into the superior courts by writ of *recordari*(*t*) directed to the sheriff, and commanding him to cause the plaint in replevin between the parties to be recorded in his county court, and, when recorded to return it at a fixed day, on which the parties are to attend in court and proceed in the action. The writ of *recordari* issues out of Chancery, and may be sued by the plaintiff in replevin without assigning any cause for the removal of the suit, but when the defendant procures the writ a fictitious cause used to be inserted(*u*), though this formality is now disregarded in Ireland. The delivery of the *recordari* to the under-sheriff or his clerk, at any time before final judgment(*v*), stays all further proceedings in the inferior court, and the record will be removed, though the writ bears date(*w*) before the plaint was entered in the county court. The plaint alone(*x*) is removed out of the county court by the *recordari*, and though the plaintiff in replevin has declared in the inferior court, a new declaration must be filed in the superior court, which has the effect of putting an end to the plaint(*y*), and affords

(*q*) Year Book, 14 Hen. IV. fo. 25, pl. 32; 2 Ro. Abr. 431, Replevin, plac. 1 and 2; Oldham v. Hamsted, 1 Lev. 90.

(*r*) Hallett v. Byrt, Carth. 381; Milles v. Davies, 2 Com. Rep. 590; and see a plea of justification by the sheriff under a replevin, Mires v. Solebay, 2 Mod. 242.

(*s*) Leonard v. Stacey, 6 Mod. 140—

69; Cases temp. Holt, 143, S. C.

(*t*) Gilb. Replevin, 140.

(*u*) Ward v. Creasey, 2 B. Mo. 642.

(*v*) Bevan v. Prothesk, 2 Burr. l.

(*w*) Gilb. Replevin, 150.

(*x*) Gilb. Replevin, 145.

(*y*) Hargreave v. Arden, Cro. 543.

the removal of the cause, the parties are placed in the same situation as in other suits, and the writ will be abated by any of the ordinary causes. A *feme sole*(z) plaintiff in replevin having married after plaint filed in the county court, the defendant, who had removed the cause by *recordari*, successfully pleaded the plaintiff's marriage in abatement of the suit. The declaration in replevin in the superior court being considered an entirely new pleading, is not required to be consistent(a) with the plaint filed in the sheriff's court: but where the sheriff returned to a *recordari* issued by the defendant in replevin, a plaint, in which several plaintiffs were joined(b), it was ruled that the plaintiffs could not file several declarations, each claiming different portions of the chattels comprised in the plaint: however, if a plaint be returned(c) into the superior court, by whatever means it may be effected, the suit will be retained. A replevin in an inferior court of Record should be removed by writ of *certiorari* issuing out of Chancery, and returnable into the King's Bench or Common Pleas, and the original(d) record of the proceedings must be annexed to the return. The return of the writ of *recordari* will be enforced on the application of either party by attachment against the sheriff, and the non-payment of his fees(e) will not be received as an excuse for his neglect or refusal: on returning the *recordari*, by whichever party it has been obtained, the sheriff(f) should give notice to the opposite party of the removal of the cause, and should require him to appear in the superior court pursuant to the tenor of the writ, and if delay in filing the *recordari* be apprehended, the other party may sue out a duplicate of the writ for the purpose of expediting the suit, and get it returned and filed. It is the duty of the plaintiff who sues out a Chancery replevin, or removes the proceedings from the county court by *recordari*, to compel the sheriff to return(g) the writ, as he is bound to prosecute his suit without delay.

25. After the writ of replevin, or writ of *recordari* has been returned and filed, the defendant should cause(h) an appearance to be entered

(z) *Hollis v. Freer*, 2 Bing. N. C. 719; 3 Scott, 284, S. C.

(a) *Hargreave v. Arden*, Cro. Eliz. 543.

(b) Year Book, 3 Hen. VII. fo. 14, plac. 19.

(c) Year Book, 3 Hen. VI. fo. 2, pl. 2; Hamm. N. P. 413.

(d) *Lyons v. Purcell*, 1 Huds. & Br. 1; *Cogan v. Fitton*, 1 Huds. & Br. 375.

(e) *Bevan v. Prothesk*, 2 Burr. 1151;

Wilk. Replevin, 29.

(f) *Harrison v. Wardle*, 5 B. & Adol. 146; 2 Nev. & M. 703; *Ward v. Crea-sy*, 2 Moore, 642.

(g) *White v. Murphy*, 1 Huds. & Br. 498.

(h) See the note to *Martin v. Gilfoyle*, 2 Fox & Smith, 152 and 247; and also the note to *Mullone v. Goold, Batty*, 575.

in the superior court, and should put a rule on the plaintiff to declare which must be served on him personally, or on his attorney, two clear days before judgement of *non pros* can be obtained. The defendant in replevin is usually desirous to expedite the suit, but if he refuse(*i*) to enter an appearance in the superior court, the plaintiff cannot file his declaration until he has enforced an appearance, and a parliamentary appearance cannot be entered for the defendant under the Irish(*j*) Process Act: the course pursued in the Queen's Bench, to compel an appearance, is founded on the English practice: after the writ of replevin or *recordari* has been returned and filed, where the latter writ is sued out by the plaintiff, a rule to appear must be served on the defendant(*k*) personally, unless there is sufficient ground for substituting the service, and in case of his non-appearance(*l*), a writ of *pone per radio* must be issued and delivered to the sheriff, upon which a summons is made out and served on the defendant: and if he do not then appear the plaintiff, on the return of *nihil*, should sue out a *distringas*, upon which issues are levied from time to time until the defendant appears when he must pay the costs of the different writs, or if *nulla bona* be returned, the plaintiff may then proceed to outlawry. If the cause be removed by writ of *recordari* sued out by the defendant, and he make default, a writ of *distringas* is the first process for compelling his appearance.

26. The declaration in replevin should be entitled of the term(*m*) in which the *recordari* is returnable, or of the term in which the writ of replevin and return is filed, or the appearance is entered. The venue is local, and must be laid in the county where the distress was taken or, if the distress be seized in one county, and carried into another, the plaintiff in replevin may, at his choice, lay the venue in his declaration either in the county where the distress was seized, or where it was impounded. A distress made in Wiltshire was impounded in the adjoining county(*n*) of Berks, and the sheriff of Berkshire having replevied the cattle, a declaration laying the venue in the county of Wilts was held good. The place of taking is technically termed the *locus in quo*, and must be specified(*o*), in the declaration as well as the vill, or

(*i*) See the note to *Mullone v. Goold*, Batty, 575.

(*j*) 43 Geo. III. c. 53, Irish; 51 Geo. III. c. 12, s. 2, English; and see *Topping v. Fuge*, 5 Taunt. 771; 1 Marsh. 341.

(*k*) See the note to *Mullone v. Goold*, Batty, 575.

(*l*) 1 Tidd's Practice, 418.

(*m*) *Topping v. Fuge*, 5 Taunt. 771; 1 Marsh. 341, S. C.; *Administrator v. Barret v. Barnard*, 2 Fox & Sm. 230; Tidd's Practice, 428.

(*n*) 2 Dyer, 168, A. pl. 20.

(*o*) *Ward v. Lavile*, Cro. Eliz. 89; *Moor*, 676, S. C.; *Read v. Hawke*, H. 16; 1 Brownl. 176; Godb. 186; *Po v. North*, 1 Saund. 347, note 1; Bu

townland; but the plaintiff in replevin is not obliged to name the place where the distress was first seized, as it is sufficient if the declaration specify any place in which the distrainer had the goods in his possession, because the law considers the distress to have been wrongfully(*p*) taken in every place where the defendant in replevin had it in his custody.

The plaintiff in replevin having declared for taking his cattle at Market-street, the defendant pleaded *non cepit modo et forma*, and proved the original seizure at Hardhall: the plaintiff, however, proved that he found his cattle(*q*) in the defendant's possession in Market-street, which was adjudged sufficient, though it appeared that the defendant first seized them at Hardhall, and was only driving them through Market-street to the pound. A declaration in replevin having stated the taking to be in the parish of Adlington, in the county of Kent, in a certain close there, a special demurrer was allowed, because the particular(*r*) place in which the cattle were taken(*s*) was not specified, and the Court observed, if the close had no name, it might be described by abuttals, or as being in the occupation of some individual.

The usual mode of declaring in replevin is to state the caption of the distress at (Ardentennant), in the county of (Cork), in a certain(*t*) place there called "The Field;" but though the addition of the latter words could not have afforded any information, their omission, in the above instance, was held bad on special demurrer: where, however, a declaration alleged the taking to be in the parish of St. Thomas, in the county of the city of Dublin, in a certain(*u*) dwelling-house there, the description was held sufficient on special demurrer: a defective statement of the place of taking will be cured by pleading(*v*) over or by verdict. A plaintiff in replevin having declared for taking his cattle in Eastfield, the defendant avowed that at the time of the caption he was seised of three acres of land in Eastfield, in which the taking is supposed to have been made, and that he took the cattle there damage-feasant, and upon special(*w*) demurrer the avowry was adjudged sufficient, be-

thorpe v. Turner, Willes, 475; Potten v. Bradley, 2 Moore & P. 78.

(*p*) Walton v. Kersop, 2 Wils. 354; 2 Selw. N. P. 1209.

(*q*) Walton v. Kersop, 2 Wilson, 354; Maltravers v. Fosset, 3 Wilson, 295.

(*r*) Potten v. Bradley, 2 Moore & Payne, 78; Bullythorpe v. Turner, Willes, 475; Read v. Hawke, Hob. 16; Godb. 186; Ward v. Lavile, Cro. El. 896; Moor, 676, S. C.

(*s*) See Lord Coke's observations in Reade v. Hawe, Godb. 186.

(*t*) See Hool v. Bell, 1 Ld. Raym. 172; 3 Ld. Raym. 139, in a place called "The Stable."

(*u*) Kenny v. Simpson, 4 Irish Law Rep. 42; Jebb & B. 17, S. C.

(*v*) Bullythorpe v. Turner, Willes, 476; Banks v. Angell, 7 Ad. & Ell. 843; 3 Nev. & P. 94, S. C.

(*w*) Saunders v. Hussey, stated in the

cause perhaps the very spot of ground where the distress was had no particular name, or was part of a waste or field, the divisions of which were not distinguished by peculiar names, and, therefore, it was right for the plaintiff to shew the name of the whole field, and the avowant to describe the very spot by the number of acres.

27. If a plaintiff declare in replevin, for taking a smaller number of cattle or goods than were really distrained and *replevied*, the defendant, after avowing the caption of the chattels mentioned in the declaration, should aver that he had distrained other cattle and goods in addition to those specified in the declaration, and should pray a return of the whole number: forty beasts having been distrained for replevin and replevied, the party replevying declared for the caption of four only (*x*), and the defendant having avowed the taking of the whole number mentioned in the declaration, and obtained judgement for a return of the forty beasts, he then applied to the Court that the sheriff should be ordered to return the forty beasts, as the smaller number was an inadequate distress, and that he should assign the replevin bond, which was conditioned for the return of the whole number taken, but the Court refused to interfere, as the defendant had avowed only for four beasts, and was then entitled to his out remedy. If the plaintiff replevy *fewer* chattels than were actually distrained, and declare only for the quantity replevied, the defendant should avow (*y*) for the whole number taken, and if successful, he will be entitled to judgement for those mentioned in the declaration, as well as for those remaining in his possession and not replevied.

28. If the plaintiff declare for the caption of a greater number of cattle (*z*) than were actually taken, and the defendant pleads pro non, generally, although the number be not denied by the plea, yet if it is proved that fewer were taken, damages will only be measured in respect of the real number which were seized, and not of the number demanded by the declaration.

29. The declaration in replevin must contain a description of the chattels sought to be recovered, certain to a general intent, as if a plaintiff declared for the taking of divers goods, to wit, a certain parcel of paper and a certain parcel of lint, after verdict for the plaintiff it was moved in arrest of judgement, that the declaration was defective in omitting to state the quantities contained in the parcels, but it

note, 1 Ld. Raym. 332; 2 Lutw. 1231, S. C.

(*x*) Snelgar v. Henston, Cro. Jac. 611; Thos. Raym. 34.

(*y*) Year Book, 14 Hen. VII. fo. 1,

pl. 4; Year Book, 35 Hen. VI. f. 1 by Prisot; Bro. Abr. Avowrie, pl. 62; Hamm. N. P. 419.

(*z*) Wood v. Foster, 1 Leon, 42, fine; Hamm. N. P. 419.

ruled(a) that although the declaration would have been ill on demurrer, the avowry had cured the defect, and that any greater certainty would be of no benefit to the parties, for if 500 reams of paper had been demanded, and only one had been proved, the plaintiff should recover, because in torts it is sufficient if any part of the declaration be established; and with respect to the difficulty of delivering the goods upon a *retorno habendo*, the sheriff is not obliged to execute the writ, unless some person attend to shew the goods(b). However, upon a declaration in replevin, stating that the defendant, in a certain dwelling-house, took divers goods and chattels of the plaintiff(c), after judgement by default and writ of inquiry executed, the judgement was arrested, because nothing whatever was shewn to guide the party as to the nature of the goods taken.

30. It must appear by the declaration, that the goods taken belong to the plaintiff(d), of which fact the allegation that they are *his goods* is a sufficient averment, but a declaration by husband and wife must shew(e) that she had some interest in the property.

31. Where a declaration in replevin alleged that the defendants took the plaintiff's goods and cattle(f), and carried them to the distance of four miles, and ill-treated and abused them, by reason whereof twenty sheep died, and other cattle were injured, and the defendants avowed generally for rent arrear, the Court held that the avowry was sufficient without traversing any of the facts stated as special damage, because the special circumstances introduced were only matter of aggravation, and did not require to be traversed in order to entitle the avowant to a return, the substantial ground of action being the taking of the cattle.

32. The action of replevin is a proceeding *in rem* to have the identical goods restored, which the claimant asserts were unlawfully taken out of his possession: both parties are actors in the suit, and though the party replevying is made the plaintiff, because he sues out the first legal process, yet the defendant who distrains(g) is really the promo-

(a) *Kempston v. Nelson*, Bac. Abr. Replevin. H. cited in *Bern v. Mattaire*, Cases temp. Hardw. 121; *Banks v. Angell*, 7 Ad. & Ell. 343; 3 Nev. & P. 94, S. C.

(b) *Rastell's Entries*, 570, B.

(c) *Pope v. Tillman*, 7 Taunt. 642; 1 Moore, 386, S. C.

(d) *Franklyn v. Reeves*, Cases temp. Hardw. 118; 2 Stra. 1023, S. C.

(e) *Serres v. Dodd*, 2 New Rep. 405.

(f) *Connor v. Bentley*, 1 Jebb & Symes, 246; 6 Law Rec. 353, 2nd Ser.; and see *Herne's Pleader*, 725.

(g) *Quia licet primâ facie videatur tenens, actor et dominus, defendens, habito tamen respectu ad hoc quod dominus distrinxit, realiter apparebit potius actor sive querens, quam defendens. Stat. Westminster 2, 13 Edw. I. c. 2, English and Irish.*

vent, and is the party usually most interested in obtaining a decision of the cause : in other actions the plaintiff does not recover the subject in controversy, or damages for its loss until after judgement, but in replevin the sheriff affords the plaintiff immediate redress by the delivery of his goods : hence the pleas of property and of *cepit in alio loco*, which have been treated as pleas in abatement, are now considered(*h*) as pleas in bar, because a plea in abatement must shew that the plaintiff can have a better writ, but as those pleas utterly destroy the plaintiff's right of action in replevin, it follows he could not have any better writ. The defendant may either justify or avow the taking, the distinction between those modes of defence being(*i*), that the justification admits the caption, but avoids its illegality, without seeking for any return of the goods, while the avowry not only justifies the taking, but claims a return of the property.

33. Where the defendant in replevin has not *taken* the goods, as in the case of a pound-keeper(*j*), who merely receives them into his pound or where the defendant neither took nor had the goods in the place(*k*) specified in the declaration, *non cepit* may be pleaded, and the plaintiff will be nonsuited, if he fail in proving the caption as alleged : but if the defendant only had the cattle in the place mentioned in the declaration, on their way to the pound, the matter(*l*) must be specially pleaded. The defendant, however, under the plea of *non cepit*, will not be entitled to a return of the goods, and if a return be required, he must plead that he took the goods in some(*m*) other place (*cepit in alio loco*), describing it, and traverse the place named in the declaration, and must also avow or make cognizance, stating the cause for which he distrained, and the avowry being only in nature of a suggestion to entitle the defendant to a return of the distress, and to damages and costs, the plaintiff cannot traverse(*n*) any matter contained in it, but must take issue on the traverse of the place : the plaintiff may reply to a plea of *cepit in alio loco*, that the place of taking is known as well by the name given to it in the declaration, as by the name assigned to it by the defendant.

(*h*) *Bullythorpe v. Turner*, Willes, 475; *Presgrave v. Saunders*, 2 Lord Raym. 984; 1 Salk. 5, 6 Mod. 81, S. C. Gilb. Replev. 161.

(*i*) Rosc. Real Actions, 631; Wilk. Replev. 47.

(*j*) *Badkin v. Powell*, Cowp. 476; and as to this plea, see *Wood v. Foster*, 1 Leon. 42; Godb. 113.

(*k*) *Johnson v. Wollyer*, 1 Stra. 507;

2 Mod. 199; 2 Selw. N. P. 1209, note

(*l*) *Abercrombie v. Parkhurst*, 2 Bos. & Pull. 480.

(*m*) *Potter v. North*, 1 Saund. 341, note 1; *Bullythorpe v. Turner*, Willes 475; *Crosse v. Bilson*, 6 Mod. 100, Bull. N. P. 54.

(*n*) *Hele v. Foot*, Carth. 139; *Wright v. Hagden*, Cro. Eliz. 372.

If goods are delivered to a person for safe custody(*o*), or to be conveyed for hire(*p*), or upon any other contract(*q*), so long as the property is held by right of such bailment or delivery, replevin does not lie, and such matter may be specially pleaded, or is admissible in evidence on the plea of *non cepit*, but if the goods be wrongfully removed by the bailee, in violation of the contract(*r*), replevin may be supported.

A woman who was married at the time of distraining, unless joined with her husband, cannot prosecute(*s*) a replevin suit as plaintiff, or be made a defendant(*t*) in such proceeding.

The defendant in replevin may plead property in himself(*u*), or in a third person, or that the goods in question are the joint property(*v*) of plaintiff and of defendant, and may conclude such plea, by praying a return and damages: and if two persons join in replevin, the defendant may plead(*w*) that the property belongs only to one of them, or if there be a sole plaintiff, a plea that the property belongs to him and to a third person may be sustained.

A defendant in replevin may also plead the Statute(*x*) of Limitations, by alleging that the cause of action did not accrue within six(*y*) years prior to the commencement of the suit.

34. By Statute(*z*) 6 Anne, c. 10, any defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record, may plead as many several matters thereto as he shall think necessary for his defence: an avowant is considered a defendant within the meaning of this Act(*a*), and may file several distinct avowries or cognizances: it has been ruled that a plea of *non cepit* is not inconsistent(*b*) with an avowry for rent, but a party will not be allowed, for the same taking, to join a cognizance in right of one person claiming(*c*) arrears of a rent-charge, with a second cognizance in right of another person, for a distress damage-*feasant*.

(*o*) Rastell's Entries, 569, A.

(*p*) Galloway v. Bird, 4 Bing. 299; 2 Moore, 547.

(*q*) Chamberlain, *ex parte*, 1 Sch. & Lef. 322.

(*r*) Reeves v. Morris, 2 Jebb & S. 699; 3 Irish Law Rep. 484.

(*s*) Eubanke v. Owen, 5 Ad. & Ell. 298; 6 Nev. & M. 799, S. C.; Clarke v. Davies, 7 Taunt. 78; 2 Marsh, 386, S. C.

(*t*) Lyons v. Gerrard, Glasc. Rep. 17.

(*u*) Presgrave v. Saunders, 2 Lord Raym. 984, 1 Salk. 5; Parker v. Mellor, 1 Ld. Raym. 217; Carth. 298; Butcher v. Porter, 1 Salk. 94; Carth. 243; Bar-

rett v. Scrimshaw, Comb. 477; Bull, N. P. 54.

(*v*) Reeves v. Morris, 2 Jebb & S. 344; 2 Irish Law Rep. 309.

(*w*) Year Book, 3 Hen. IV. fo. 16, pl. 9; Co. Litt. 145, B.

(*x*) 10 Car. I. sess. 2, c. 6, Irish; 21 Jac. I. c. 16, s. 3, Eng.

(*y*) Arundel v. Trevill, 1 Siderf. 81.

(*z*) 6 Anne, c. 10, s. 4, Ir.; 4 Anne, c. 16, s. 4, English.

(*a*) 2 Selw. N. P. 1214.

(*b*) Daly v. Scott, 4 Law Rec. 99, 1st Ser. K. B.

(*c*) Cooper v. Coates, Smythe, 130.

35. A defendant in replevin residing out of the jurisdiction considered as standing in the situation of an ordinary plaintiff, be ordered to give security for the costs of the suit, but such is not required, where a bailiff or other person(*e*) resident within jurisdiction, is joined as a co-defendant with the foreign resident. The general rule is, that courts of justice have no power(*f*) to order a person to pay costs, who is no party to the record, except in ejectment, where the party substantially interested, in consequence of the fictitious nature of the proceeding, has been ordered to give security for costs of the action; in replevin or trespass, while the suit(*g*) is in progress, an order may be obtained to stay proceedings, until security for costs be given, either by the adverse party, or by the person removing the litigation, and for whose benefit it is carried on, until verdict or judgement(*h*), the Court will not compel a third person to pay the costs of the cause: nor where such third person might have been made a defendant(*i*). An action of trespass was brought by a tenant of Lord Clanrickarde, for the purpose of trying a right of way, and the proceedings were stayed until security for costs given by Lord Clanrickarde(*j*), who it appeared had promised to pay the costs. The poverty or insolvency of the defendant in replevin affords no ground for compelling(*k*) him to find security, nor will a seafaring man be called upon to give security(*l*), though he has no residence in England. In a replevin suit between landlord and tenant, the landlord is not to be required to give security for costs, though resident at the time of his consenting that the tenant shall retain his rent in discharge of the costs which shall be awarded in the cause against the absent landlord.

36. Where a distress is made through error or mistake, and a writ of *habeas corpus* is granted, and the plaintiff's suit were prosecuted, the plaintiff could only recover nominal damages.

(*d*) *Selby v. Crutchley*, 1 Brod. & B. 505; 4 Moore, 280; *Macnamara v. Booth*, 1 Cr. & Dix, 84.

(*e*) *Reddick v. Sinnott*, 1 Huds. & Br. 204.

(*f*) *Hayward v. Giffard*, 4 Mees. & W. 194.

(*g*) *Ball v. Ross*, 1 Mann. & Gr. 445; 1 Scott, New Rep. 217; *Tenant v. Brown*, 5 B. & Cress. 208; *Evans v. Rees*, 2 Q. B. Rep. 334; 1 G. & Dav. 579, S. C.; and see *Hearsey v. Pechell*, 5 Bing. N. C. 466; 7 Scott, 477.

(*h*) *Evans v. Rees*, 2 Q. B. Rep. 334; 1 G. & Dav. 579; *Blewitt v. Tregoning*, 5 Dowl. Pr. Ca. 404.

(*i*) *Anon. Comb.* 242; *Berkeley v.*

Dimery, 10 B. & Cress. 113.

(*j*) *Egan v. Kirkaldy*, Lord 247; 3 Irish Law Rep. 542.

(*k*) *Hiskett v. Biddle*, 5 1 Ca. 634; 1 Hodges, 119, S. C.

(*l*) *Corscaden v. Stewart*, 1 Rep. 110; 3 Irish Law Rep. 5.

(*m*) *Lessee Nagle v. Power* Exch. Rep. 421, where a seizure was made in ejectment; and *towe v. Needham*, 2 Dowl. P. N. S.

(*n*) *Pickering v. Truste*, 7 Banks *v. Brand*, 3 M. & Selw. see *Hodgkinson v. Snibson*, 3 603.

images, the Court have sometimes stayed the proceedings on the defendant's application, upon payment of the costs of the action, the costs of the distress and of replevying, and upon giving up the replevin bond to be cancelled. Proceedings in replevin for recovery of rent will also be stayed on the tenant's application, upon payment of the rent(*o*) in arrear, and of the costs of the action. Neither plaintiff(*p*) nor defendant(*q*) will be suffered to enter a rule to discontinue the suit without leave of the Court, because both parties being actors, neither can put an end to the cause, without the consent of the other, or the authority of the Court.

<p>(<i>o</i>) <i>Hopkins v. Shrole</i>, 1 Bos. & P. 382; <i>Newman v. Bernard</i>, 10 Bing. 274; 3 Moo. & Sc. 748; <i>Vernon v. Wynne</i>,</p>	<p>1 H. Bla. 24; Anon. 8 Mod. 379. (<i>p</i>) <i>Beare v. Underwood</i>, 1 Leon. 105. (<i>q</i>) <i>Long v. Buckeridge</i>, 1 Stra. 112.</p>
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CHAPTER VI.

REPLEVIN.

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| 37. <i>Cognizance by Bailiff.</i> | 44. <i>Statement of Title in general Avowry.</i> |
| 38. <i>Different Sorts of Avowry at common Law for Rent.</i> | 45. <i>Avowry must answer the whole Complaint.</i> |
| 39. <i>Statute 33 Hen. VIII. Sess. 1, c. 17.</i> | 46. <i>Statement of the Rent.</i> |
| 40. <i>Irish Statute enabling Landlords to avow generally.</i> | 47. <i>Where Right to distrain given by Statute.</i> |
| 41. <i>Reversion necessary to sustain general Avowry.</i> | 48. <i>Avowry for Damage-feasant must set out Title.</i> |
| 42. <i>For what Rents general Avowry lies.</i> | 49. <i>Distress must be made while Cattle actually trespassing.</i> |
| 43. <i>Party may distrain for one Cause, and avow for a different Cause.</i> | 50. <i>Each Animal trespassing only liable for Damage done by itself.</i> |

37. IF a plaintiff in replevin complain of an unjust taking by landlord alone, the caption should be avowed by the defendant in own right, and if the declaration allege the taking by the bailiff, or agent of another, the word "acknowledge" should be used instead of the word "avow;" or if both landlord and bailiff be joined in the replevin, the principal avows, and the bailiff makes cognizance, or acknowledges the distress: the introduction of the expression "avow" into a cognizance by a bailiff, instead of the more (a) technical term "acknowledge," is merely a formal defect, and not even ground of special demurrer.

A cognizance is the justification for taking a distress in right of another, and it is sufficient to acknowledge the caption by the defendant as bailiff of such person, without showing any authority for the purpose, but the plaintiff may (b) traverse the fact of the defendant being bailiff, for though J. S. may be entitled to distrain, yet a third person having no authority from J. S. has no such right: a subsequent assent by the principal to a distress, is considered equivalent to an express authority for that purpose previously given by him: a cestui que trust having made cognizance as bailiff of his trustee, and is being joined on his authority, it was ruled (c) that a letter written

(a) *Wheadon v. Sugg*, Jenk. 338, case 87; Cro. Jac. 373.

(b) *Trevilian v. Pyne*, 1 Salk. 107; 11 Mod. 112; *Potter v. North*, 1 Saund. 347, C. note 4.

(c) *Myles v. Johnston*, 3 Law Rec. 1st Ser.; *Hull v. Pickersgill*, 1 Br. Bing. 282; 3 Moore, 612; Godb. 1 case 129; 2 Leon. 196, case 246.

the trustee, on the day preceding the trial, sanctioning the distress, was sufficient evidence of assent, though the trustee was not previously aware of any distress being made: so a landlord who directed a broker to distrain, having died before the distress was commenced, the broker distrained in the name of the deceased, and it was ruled(*d*) that a cognizance by him as bailiff of the executrix of the deceased landlord might be supported on a traverse of the authority, as the executrix had adopted the distress, though she had not then obtained probate. The employment of an attorney by a landlord(*e*) to defend a bailiff in a replevin suit, has been held a recognition of the bailiff's authority to make the distress.

One joint-tenant may constitute a bailiff to distrain for rent due to himself as well as to his companions, without their assent, because every joint-tenant has a right to distrain(*f*) as the bailiff of his companions, and it comes to the same thing whether he distrains by himself, or appoints a bailiff to do so. A defendant in replevin may justify a distress for rent, not only by an avowry in his own right, but by making cognizance as bailiff of persons having title to, or interest in the reserved rent, or for the purpose of avoiding difficulties in the establishment of his own right: a devisee may avow in his own right, and in a subsequent cognizance acknowledge the taking as bailiff of the heir at law, or of trustees; and in like manner, one tenant in common may avow the taking for his own share of the rent, and make cognizance(*g*) as bailiff of the other tenants in common for their respective shares; but if the command be traversed, some authority to distrain, or adoption of the distress by the principal, must be proved. A cognizance as bailiff of a corporate body, need not allege any authority in writing(*h*), as the precept of a corporation authorizing a distress, or for such matters is not required to be under seal, or in writing. The Statute of Westminster(*i*) the second, which enacts that no distress shall be taken, except by bailiffs "sworn and known," does not(*j*) apply to distresses for rent-arrear.

38. There were four sorts of avowry(*k*), at common law, for rents

(*d*) *Whitehead v. Taylor*, 10 Ad. & Ell. 210; 2 P. & Dav. 367, S. C.

(*e*) *Duncan v. Meikleham*, 3 Carr. & P. 172.

(*f*) *Robinson v. Hoffman*, 4 Bing. 362; 1 Moo. & P. 472; *Leigh v. Shepherd*, 2 Brod. & B. 465; 5 Moore, 297, S. C.

(*g*) *Leigh v. Shepherd*, 2 Brod. & B. 465; 5 Moore, 297; *Page v. Stedman*, Carth. 364.

(*h*) *Manby v. Long*, 3 Lev. 107;

Cary v. Matthews, 1 Salk. 191; 6 Vin. Abr. 289, Corporations, K. plac. 25; *Smith v. Birmingham Gas Light Company*, 1 Adol. & Ell. 526; 3 Nev. & M. 771.

(*i*) 13 Edw. I. c. 37, Westminster the Second, English & Irish.

(*j*) *Begbie v. Hayne*, 2 Bing. N. C. 124; 2 Scott, 193, S. C.

(*k*) *Ascough's case*, 9 Rep. 135, B.; *Co. Litt.* 269, A. and B.; *Johnson v. Grant*, Thos. Raym. 257.

or services—first, an avowry by reason of tenure, when the lord was seised in fee of the manor or seignory, and the tenant had an estate in the tenancy, the lord avowed as upon his(*l*) very tenant, *verum tenentem suum* ;” secondly, an avowry by the lord upon the matter as upon his very tenant by the manner, “*ut super verum tenentem in formâ prædictâ*,” or according to the nature and particular circumstances of the case ; which occurred when the tenant made a lease for life, or gift in tail with the remainder in fee, for if the lord was seised in fee of the seignory, he was obliged to avow upon the matter as upon his very tenant by the manner (on the word “very”) which was when the lord had a particular estate in the seignory, as an estate in tail, or for life, or for a lesser term ; he should avow upon the tenant by the manner, or according to the particular circumstances of the case : in the same way, the lord could avow upon the donee, or the lessor upon the lessee(*m*) for years, and if the rent of tenant for years were in arrear, the lord could not have avowed generally upon the termor(*n*) as upon the termor but upon the special matter ; fourthly, upon the matter in the tenancy within the fee and seignory of the lord ; where the tenant by the service(*o*) made a lease for life rendering rent, and died leaving a child within age, the guardian was obliged to avow upon the lessor as upon the matter *materiam prædictam in terris et tenementis prædictis ut in, et dominium suum*.” In an avowry for a rent-charge, it was considered necessary to shew who was the tenant of the premises ; the lord could avow upon the land(*p*) generally, as in land charged and bound by the distress of the avowant.

39. The obligation imposed on the lord to avow upon the tenant, was effected without much difficulty, according to the common law, because the tenant paid a small fine on every(*r*) alienation ; the alienee was presented at the next manor court ; but when the lord ceased to collect those small fines, or to keep regular courts, the tenant was unable to ascertain their very tenants, and consequently to whom they should avow : and even if the lord avowed upon

(*l*) Very, vrai, veray, verus : that is, true, real.

(*m*) 3 Dyer, 257, A. plac. 11 ; Year Book, 2 Hen. IV. fo. 24, plac. 13 ; Bro. Abr. Avowrie, pl. 36.

(*n*) Year Book, 5 Hen. VII. fo. 11, pl. 2 : Sed Fairfax disoit que le tenant, par terme des ans fera fealtie et le seig-

neur est *dominus* pur le terme de reversion, et avowry sera sur le come sur le matter, lequel

(*o*) Year Book, 38 Hen. III. pl. 7 ; Bro. Abr. Avowrie,

(*p*) Lancaster v. Lucas,

(*q*) 3 Dyer, 257, A. pl.

(*r*) Gilb. Repl. by Hunt

person as his very tenant, yet the avowry(s) would have abated, if it did not set out the true title of the tenant in the lands, as if, for instance, a lord avowed upon a person as heir to his mother, when, in fact, he took as heir to his father. The avowant, or person making cognizance being in nature of a plaintiff, as he claimed a return of the distress, the avowry or cognizance was considered in nature of a declaration(t), and was therefore required, at common law, to shew a good title *in omnibus*, and in this respect differed from a justification in trespass, in which it was only necessary to shew sufficient matter to excuse the trespass.

For the purpose of facilitating the remedies of lords of manors for recovery of their rents from tenants holding under them in fee, it was enacted by the Irish Statute(u), 33 Hen. VIII. s. 1, c. 7, that where-soever any manors, lands, tenements, or other hereditaments be holden by any person by rents, customs, or services, that if the lord of whom such manors, lands, &c., be so holden, distrain upon the same for such rents, customs, or services, and replevin thereof be sued, that the lord of whom the same lands, &c., be so holden, may avow, or his bailiff or servant may make cognizance or justify for taking such distresses upon the same lands, &c., so holden, as in lands or tenements *within his fee* or seignory, alleging in such avowry and cognizance the same manors, lands, tenements to be holden of them, *without naming any person certain to be tenant of the same, and without making any avowry or cognizance upon any person certain.*

This Statute enabled the lord in avowing for his rent, to allege that the lands, out of which the rent issued, were holden of him as of his manor(v), which was called avowing generally *upon the land*, because it was not necessary to shew who was tenant of the premises when the rent became due, nor to name(w) any person as tenant of the land: the relief given by the Statute was confined to cases(x) of tenure, where the tenant held of the lord in fee, and did not extend to a person seised of the rent and reversion of lands, subject to a lease of limited duration.

40. Hence a landlord seised of the reversion in demised premises,

(s) The Case of Avowries, 9 Rep. 21, B.

(t) Potter v. North, 1 Saund. 347, B. note 3; Goodman v. Aylin, Yelv. 148; Rogers v. Birkmire, Cases temp. Hardw. 247; 2 Stra. 1040, S. C.

(u) 33 Hen. VIII. Sess. 1, c. 7, s. 1, Irish; 21 Hen. VIII. c. 19, English.

(v) Whitley v. King, Clift's Entries,

637, Replevin, pl. 6; Bulpit v. Clarke, 1 New Rep. 56-60; Paramor v. Chapman, Cro. Jac. 127; Bro. Abr. Avowrie, pl. 113.

(w) Lacy v. Fisher, 1 Leon. 301; Cro. Eliz. 146.

(x) Banks v. Angell, 7 Ad. & Ell. 843; 3 Nev. & P. 94, S. C.

encountered considerable difficulties in avowing for rent against a lessee for lives or for years, as he was obliged to shew a privity between himself(*y*) and the person on whom he distrained, and consequently the tenant was enabled to involve his landlord in great expense by traversing some part of his title: it was necessary to state in the avowry or cognizance, that the landlord, or some person(*z*) from whom he derived the reversion, was seised, and the quantity of estate of which he was seised, and that he demised for life or for years, and the descent or grant of the reversion to the avowant: and in like manner, if a termor or person holding for years(*a*), underlet part of the premises for a lesser term, at an ascertained rent, it was requisite that the avowry should trace the particular estate of the lessor from the fee, thereby affording an opportunity to the lessee of traversing the title of those from whom the avowant derived.

In order to remove the difficulties experienced by landlords in maintaining avowries and cognizances for rent, the Irish Statute(*b*) 25 Geo. II. c. 13, after reciting that avowries or conusance upon distresses cannot be made upon articles, minutes, or contracts in writing *whereby the rent(c) payable for the same is ascertained, but the said articles, minutes, or contract do not contain an actual demise*, notwithstanding there hath been an (ejectment) under the same(*d*), enacted, that it shall be lawful for all defendants to avow or make conusance generally, that the plaintiff in replevin, or other tenant of the lands, tenements, or hereditaments whereon such distress was made, enjoyed the same under a grant, or demise, or article, minute, or contract in writing at such a certain rent, during the time wherein the rent so distrained for incurred, which rent was then and still remains(*e*) due, without further setting forth the grant, tenure, or demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such lands, tenements or hereditaments: and it shall be no objection to any such article(*f*) minute, or contract, that the same doth not contain an actual demise

(*y*) *Haire v. Lloyd*, 1 Ridg. P. C. 352.

(*z*) *Poole v. Longuevill*, 2 Saund. 284, D., note 3; *Ryan v. M'Auley*, 1 Jebb & Symes, 324.

(*a*) *Scilly v. Dally*, 2 Salk. 562; 1 Ld. Raym. 331; Carth. 444; Comb. 476; 1 Bro. Parl. Ca. 525; *Reynolds v. Thorpe*, 2 Stra. 796; *Haire v. Lloyd*, Vern. & Scr. 129; 1 Ridg. P. Ca. 341.

(*b*) 25 Geo. II. c. 13, s. 4, Irish; 11 Geo. II. c. 19, s. 22, English.

(*c*) The words in italics are taken from the recital preceding the second section of the Act.

(*d*) A mistake in the Statute for the word "enjoyment;" see *Charters Sherrock, Alc. & Nap.* 17.

(*e*) See *Clark v. Davies*, 7 Taunt. 7; 2 Marsh. 386, S. C.

(*f*) The English Statute, 11 Geo. II. c. 19, s. 22, does not extend to executory contracts for leases; *Hegan Johnson*, 2 Taunt. 148.

any law or usage to the contrary(*g*) notwithstanding : and if the plaintiff in such action shall become non-suit, discontinue his action, or have judgement given against him, the defendant, or defendants in such replevin, shall recover double costs of suit.

41. This Statute embraces all cases in which the relation of landlord and tenant subsists, and an ascertained rent is in arrear, whether the party replevying be tenant of the lands or be a third person, and whether the holding is created by lease under seal, or by parol(*h*) demise, or by an executory contract in writing for a lease, and whether the premises are holden for lives, for years, from year to year, or at will: but it does not extend to an avowry(*i*) for a rent-charge, nor to a rent charged by Act of Parliament on the rates of a canal(*j*), with power to distrain and sell, in such manner as the law directs in cases of distress for rent, for this latter provision does not apply to the Act giving the general avowry(*k*), but to the Statute authorizing the sale of distresses for rent.

One Mark Patton being possessed of a dwelling-house for the residue of a term of eighty-one years from the 1st of November, 1789, died, having by his will appointed executors, who obtained probate: the executors, by indenture dated the 1st of October, 1815, purporting to be a lease, demised the premises for a term of years, which would not expire until after the expiration of the original term of eighty-one years, subject to a yearly rent of £36 18s., payable to the lessors, their executors, administrators, and assigns: the executors distrained, and having avowed for rent generally under the Statute, the lessee pleaded *non tenuit*, and the Court ruled(*l*) that the instrument of October, 1815, was, in point of law, an assignment, and not a lease, and as no reversion had been retained by the executors, the rent avowed for was merely a rent-charge, and that the plaintiff in replevin was entitled to judgement.

In a later case it appeared that William Hughes, and Maria his

(*g*) The earliest enactment for the purpose of relieving landlords from the necessity of shewing title in avowries for rent, was the Irish Statute, 9 Geo. II. c. 5, s. 5, which was followed, and in some respects improved by the English Statute, 11 Geo. II. c. 19, s. 22. The facilities of avowing were adopted by the Irish Act, 25 Geo. II. c. 13, and extended to equitable agreements for lease; and the preceding Irish Act, being only temporary, was suffered to expire.

(*h*) *Haire v. Lloyd*, 1 Ridg. P. C. 355; Vern. & Scr. 132.

(*i*) *Bulpit v. Clarke*, 1 New Rep. 57; *Duggan v. O'Connor*, 1 Huds. & Br. 465; *Pluck v. Digges*, 5 Bligh, Parl. Ca. 42.

(*j*) *Leominster Canal Co. v. Cowell*, 1 Bos. & P. 213; *Leominster Canal Co. v. Norris*, 7 T. R. 500.

(*k*) 1 Bos. & Pull. 214.

(*l*) *Rankin v. Newsam*, 1 Huds. & Br. 70; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; 5 Scott, 117, S. C.

wife, and others, being seised, by virtue of a lease for three lives and a covenant of renewal for ever, by indenture dated the 19th of February 1821, granted and released the same lands to one Thomas Pluck, heirs and assigns, for three lives, with covenant of renewal for ever, at the yearly rent of £61 8s. 6d., containing a clause of distress, condition of re-entry, and the usual covenants between landlord and tenant; the lessors having distrained(*m*), avowed generally under the Statute for rent-arrear, and the plaintiff in replevin pleaded *non tenuit*: it was proved on the trial, by the plaintiff in replevin, that the grant to Thomas Pluck was made for the same lives as those which were inserted in the original lease, and after verdict for the avowants, a bill of exceptions was taken to the judge's charge, because it appeared that persons who avowed the taking had not any reversion in the premises, and were not entitled to avow generally under the Statute: the Court of Common Pleas overruled the exception, and gave judgement for the avowants, and upon a writ of error the judgement was affirmed by a majority of the judges of Ireland, chiefly on the ground that evidence was not admissible on the part of the plaintiff in replevin, to shew that the lives named in the grant to Thomas Pluck were the same persons as the *cestuique vies* in the lease under which the avowants held, that the plaintiff in replevin was not at liberty to contradict the deed constituting his right to the possession of the premises, by insisting that the avowants were not his landlords, and had only a rent-charge issuing out of the lands. Upon a writ of error to the House of Lords the judgement of the Irish Exchequer Chamber was reversed, Lord Tenterden observing(*n*) that the rent payable by the plaintiff in replevin could not be considered as a rent-service, because there was no reversion, and that the exemption from the necessity of setting out in an avowry was not allowed by the Statute(*o*), in the case of a rent-charge payable to a person who had no reversionary interest in the land. So, a tenant for years having only two months of his term expired, by *parol* demised the whole of his interest, without retaining any reversion, but reserving a fixed rent: upon a verdict, finding that the avowant had parted(*p*) with the whole of his term, it was decided that he had no right to distrain.

However, in an action of covenant by an assignee of the reversion

(*m*) Pluck v. Digges, 2 Huds. & Br. 1.
 (*n*) Pluck v. Digges, 5 Bligh's Parl. Ca. 31, N. S.; 2 Dow. & Clarke, Parl. Ca. 180: and see Thorn v. Woolcombe, 3 B. & Adol. 586; Parmenter v. Webber, 8 Taunt. 593; 2 Moore, 656; Wil-

liam De Maundeville's case, Year 8 Edw. III. fo. 3, plac. 8.

(*o*) 25 Geo. II. c. 13, s. 4, Irish

(*p*) Preece v. Corrie, 5 Bing. Moo. & P. 57; Pascoe v. Pascoe, 5 Bing. N. C. 898; 5 Scott, 117, S.

against the lessee, where the declaration alleged that the lessor being seised(*q*) for three lives (naming them), demised for three lives (naming them), though the names and descriptions of the *cestuique vies* in both leases were the same, the Court, on demurrer, would not infer they were the same persons, as it had not been so averred. A person seised in fee having demised for sixty-one years, afterwards made a lease for years of the same premises to a third person, to commence on the expiration of the preceding demise, it was ruled(*r*) that by the grant of the second lease, the lessor did not part with his reversion so as to disentitle him to distrain for rent due by the original lessee under the first lease, as the second lessee had merely an *interesse termini* until the determination of the former lease. A creditor by *elegit* has a right to distrain(*s*), and avow generally for rent payable by a tenant holding by lease made subsequently to the rendition of the judgement, after the creditor had obtained judgement in ejectment, and the tenant had attorned to him, although the debtor parted with his reversion in the demised premises before the attornment was executed. In order to sustain an avowry for rent, the reversioner must continue seised of the same reversion to which the rent is incident, for where a lessee for one hundred years made an underlease for twenty years, rendering rent, and the original lessor afterwards conveyed the reversion in fee to a purchaser(*t*), who also acquired the term of one hundred years, it was ruled that the purchaser should not recover the rent reserved by the underlease, because the reversion of the term to which it was incident had become merged in the fee.

42. A general avowry lies for recovery of a penal rent: a lease being made for twenty-one years, at a yearly rent of £130, with a covenant to pay for every acre, above one-third part of the whole farm, which should be converted into tillage during the last three years of the term, £3 as an increased rent yearly during such last three years, exclusively of the rent before reserved, it was ruled(*u*) that a general avowry for the rent of £130, as well as for the penal rent, was maintainable under the Statute: so where the rent is reserved, payable in advance(*v*), and a distress is made for rent due at the commencement

(*q*) *Byrne v. Moriarty*, cited 1 Fox & Sm. 11.

(*r*) *Smith v. Day*, 2 Mees. & W. 684; and see *Barton v. Barclay*, 7 Bing. 745-758; 5 Moo. & P. 785, S. C.

(*s*) *M'Dowell v. Reynolds*, 4 Law Rec. 59, 2nd Series.

(*t*) *The Lord Treasurer v. Barton*, Moor, 94; *Webb v. Russell*, 3 T. R.

393; *Thorn v. Woolcombe*, 3 B. & Adol. 586.

(*u*) *Roulston v. Clarke*, 2 H. Bla. 563; *Dignum v. Palmer*, 2 Fox & S. 306; *Allpress v. Trumbull*, in the Irish Exchequer Chamber.

(*v*) *Charters v. Sherrock*, Alc. & Nap. 17; *Buckley v. Taylor*, 2 T. R. 600.

of the gale, the landlord may avow for such rent under the Statute, and need not set out his title. A party may, in like manner, avow generally for the rent of furnished lodgings(*w*), because the rent issues out of the house and land, though the value of the premises be increased by the furniture.

43. A person distraining is not obliged to justify the caption of the cause assigned(*x*) when it was made, for if a party allege at the time of distraining, that the goods were seized for rent in arrear, he may afterwards avow the taking for fealty(*y*), or other different cause, and although a distrainer profess to act under a warrant which is illegal, provided he were armed(*z*) at the time with a lawful warrant, the distress may be justified, for he is not confined, *in Court*, to the authority which alone he may have produced when he acted, but is at liberty to resort to any authority which he possessed that justified his proceeding. So where premises are distrained for rent alleged to be due to one person, or for one rent, an avowry may be maintained for rent due(*a*) to another person, or for a different rent(*b*): but though a person taking goods under a distress-warrant is not precluded by anything which he says at the time of seizure, from applying the goods to the purposes directed by the warrant, yet if he apply the distress to a different purpose, and leave the object of his warrant wholly unsatisfied, he will not afterwards be suffered to have recourse to his warrant for protection.

44. A general avowry under the Statute need not set forth(*d*) to whom the demise was made, under which the premises are enjoyed, but it must state correctly the amount of the rent, and when payable, and to whom the rent distrained for is due, and must allege(*e*) that the plaintiff in replevin, or some other specified person, held the lands

(*w*) *Newman v. Anderton*, 2 New Rep. 224; *Farewell v. Dickenson*, 6 B. & Cress. 251; 9 D. & Ry. 345; *Dignum v. Palmer*, 2 Fox & Sm. 311.

(*x*) *Fitzherbert*, Abr. Avowrie, pl. 232; *Godb.* 110; 2 Leon. 196; *Butler and Baker's case*, 3 Rep. 26, A.; *Groenvelt v. Burwell*, 1 Ld. Raym. 466.

(*y*) *Crowther v. Ramsbottom*, 7 T. R. 657; *Gwinnet v. Phillips*, 3 T. R. 643; *Etherton v. Popplewell*, 1 East, 142.

(*z*) *Governors of Bristol Poor v. Wait*, 1 Ad. & Ell. 264–281; 3 Nev. & M. 359–371; *Ridgway v. Hungerford Market Co.*; 4 Nev. & M. 804, by Little-dale, J.

(*a*) *Wootley v. Gregory*, 2 Youngs J. 536.

(*b*) *Short v. Hubbard*, 2 Bing. 44.

(*c*) *Lucas v. Nockells*, 4 Bing. 72; 747; 10 Bing. 157–187–196; 1 Moo. P. 783; 3 Moo. & Sc. 650; 3 Youngs J. 304; 7 Bligh's P. C. 150; 1 Clark & Finn. 438; and see the Year Book Hen. IV. fo. 34, pl. 1, par Gascoigne; *Butler's case*, 1 Leon. 50; *Lamont Southall*, 5 Mees. & W. 416.

(*d*) *Haire v. Lloyd*, 1 Ridg. P. 341; Vern. & Scr. 127; *Wadham Marlowe*, 8 East, 316, in the note.

(*e*) *Innes v. Colquhoun*, 7 Bing. 26; 5 Moo. & P. 63.

respect of which the distress was made, as tenant to the avowant. The form of avowry usually adopted has been sanctioned by the Irish House of Lords(*f*), and avows the taking, because the plaintiff in replevin (or one R. H. *according*(*g*) to the fact), continually from the 1st day of May in the year 1839, until and upon the 1st day of May then next following, and from thence until the same time when, and so forth, *enjoyed* the said place in which, &c., by virtue of a *demise*, at a yearly rent of £100, payable half-yearly, on every 1st day of November and 1st day of May in every year by equal portions; and because £100 of the rent aforesaid, for one whole year's rent due and ending on the 1st day of May, 1840, on that day, and in that year, and also at the said time when, &c., were due and payable, and in arrear and unpaid by the plaintiff (or the said R. H.), to the defendant (in replevin) as landlord of the premises, he the said defendant well avows the taking of the said cattle, goods and chattels in the same place in which, &c., and justly, &c., as a distress for the said sum of £100 of the rent aforesaid, so then being in arrear and unpaid. If the premises are holden under an accepted proposal or equitable agreement for a lease, the avowry should state the enjoyment to be under a contract in writing, or under an article in writing, but after payment of a year's rent under the instrument, a demise will be implied. The fact of a holding or tenancy(*h*) under the avowant, may be supplied by implication, or collected by inference, if it should not be precisely alleged in the avowry, but an avowry "stating that certain persons unknown to the avowant, enjoyed the close in which, &c., as tenants to the avowant by virtue of a demise made by one J. A. to one W. W. for an unexpired term of years, at a yearly rent of £100, payable on &c., and that all the interest of W. W. in the term had vested in such unknown(*i*) persons, and that one year's rent ending, &c., was due from such unknown persons to the avowant by virtue of said demise," was, upon demurrer, held insufficient, because the Statute requires the avowry to allege that the plaintiff in replevin, or other tenant, held under a grant or demise, for otherwise the plaintiff could not know how to plead, and in this case, the avowant only shewed a title to which he was himself a stranger.

A general avowry for an entire rent cannot be supported on a plea of *non tenuit*, if it appear that the plaintiff in replevin did not hold, as

(*f*) *Haire v. Lloyd*, 1 Ridg. P. C. 341; Vern. & Scr. 127; and see the precedent of the avowry stated in the case.

(*g*) 2 Chitty's Plead. 1047, 5th edit.;

Joseph Chitty's Precedents, 706.

(*h*) *Innes v. Colquhoun*, 7 Bing. 265; 5 Moo. & P. 63.

(*i*) *Banks v. Angell*, 3 Nev. & P. 94; 7 Ad. & Ell. 843.

tenant to the avowant, the whole of the premises at the rent specified but merely enjoyed(*j*) two-thirds of the demised premises as his tenant subject to a proportion of the reserved rent: an avowry for rent upon a demise at the yearly rent of £170, is not maintained by proof that three trustees, who were seised of the rent and reversion(*k*), by deed executed only by two of them, conveyed their estate to the avowant because the avowant being only tenant in common with the trustees who omitted to execute the conveyance, should avow merely for two-thirds, and not for the whole rent.

Tenants in common distraining for rent(*l*), must sever in their avowries, because they derive the rent and reversion by different titles but they must join(*m*) in actions relating to the personality, and, therefore, if a tenant in common avow for taking cattle damage-*feasant*(*n*) he should also make cognizance as bailiff of his co-tenant: joint-tenants and parceners must join(*o*) in an avowry, and if a replevin be sued against one of them alone, he must avow in his own right, and make cognizance as bailiff of his companions for the entire rent, and though his authority be traversed, their assent(*p*) need not be proved in order to sustain his avowry. If a demise be made by a wife before marriage and continue afterwards, it may be proper to avow(*q*) upon a demise by the husband and wife jointly, though the husband may avow alone where he is landlord in right of his wife: upon an avowry by husband and wife, it appeared he was seised in fee in her right, but the only evidence of the demise was a bill of exchange(*s*) for sixty pounds being rent for three quarters of a year, which was drawn by the husband alone upon, and accepted and paid by the tenant, and which was ruled disproved any joint demise.

45. Upon a declaration in replevin for taking certain cattle, goods and chattels, a cognizance acknowledging the caption of the cattle only, was held(*t*) to be insufficient on demurrer, as the defendant

(*j*) *Philpott v. Dobbinson*, 6 Bing. 104; 3 Moo. & P. 320; *Gilb. Replev.* by Hunt, 182; *Duppa v. Mayo*, 1 Saund. 286; *Bathey v. Trevillion*, Moor, 281, the 8th point; *Hill v. Bolton*, 2 Lutw. 1172; but see *Clotworthy v. Michell*, *Winch's Rep.* 49.

(*k*) *Philpot v. Dobbinson*, 6 Bing. 104; 3 Moo. & P. 320; *Roberts v. Snell*, 1 Mann. & Gr. 577.

(*l*) Litt. sect. 314 and 317; *Pullen v. Palmer*, Carth. 328; 1 Salk. 207; *Harrison v. Barnby*, 5 T. R. 246; *Whitley v. Roberts*, M'Clell. & Yo. 107.

(*m*) Co. Litt. 198, A.

(*n*) *Culley v. Spearman*, 2 H. B. 386; *Anon. W. Jones*, 253, pl. 4.

(*o*) *Leigh v. Shepherd*, 2 Brod. & 465; 5 Moore, 297; *Page v. Stedman*, Carth. 364; *Stedman v. Bates*, 1 L. Raym. 64, S. C.

(*p*) *Robinson v. Hofman*, 4 Bing. 56; 1 Moo. & P. 474.

(*q*) *Parry v. Hindle*, 2 Taunt. 180.

(*r*) *Gravenor v. Woodhouse*, 2 B. & 71; 9 Moore, 148; *Osborne v. Wenden*, 1 Mod. 272.

(*s*) *Parry v. Hindle*, 2 Taunt. 180.

(*t*) *Hunt v. Braines*, 4 Mod. 40; *Johnson v. Adams*, 5 Mod. 77, S. C.

bound to answer the whole of the complaint, and will not be permitted to insist on a partial defence, but it is unnecessary(*u*) that the avowry should traverse or deny any matter of aggravation alleged in the declaration. An avowry having stated that the plaintiff in replevin held the premises(*v*), consisting of four closes, of the avowant at a certain rent, it appeared upon a plea of *non tenuit* that the tenant held two other closes along with those mentioned in the avowry under the same demise at the specified rent, and it was ruled there was no variance, as each portion of the land demised was liable to the whole rent: and upon a plea of *non tenuit* to an avowry for the rent of a dwelling-house with the appurtenances(*w*), it appeared that the plaintiff in replevin held the dwelling-house, with the exception of the shop and back-yard, which had been demised separately, and it was decided that the substance of the issue was proved by shewing a tenancy in the principal part of the house under the avowant.

46. The terms of the tenancy, with respect to the amount of the reserved rent, and the days or times on which the rent is made payable, should be set out with accuracy: a landlord having avowed upon a holding at a yearly rent, to wit, the yearly rent of £72, payable half-yearly, and issue being joined on the pleas of *non tenuit*, and of *riens en arriere*, it was proved that the yearly(*x*) rent was £72 9s.; and it was ruled that the tenant was entitled to a verdict on his plea, denying that he held at the rent of £72, and that the jury should have been discharged from finding on the other issue, which had become immaterial. Where, however, a landlord was defeated(*y*) in a replevin suit by an insolvent tenant on a similar point of form, the Common Pleas gave leave to amend the avowry, granted a new trial, and ordered the landlord to lodge in Court the costs of the trial, to be applied as justice should require according to the result. If an acreable rent be reserved instead of a gross rent, the landlord, in one avowry(*z*), should proceed for an acreable rent, and in another avowry, for the yearly rent which the tenant was in the habit of paying, because a miscalculation of the quantity(*a*) of land demised might occasion a variance, and a regular payment of a certain sum yearly would afford evidence of an ascer-

(*u*) Connor v. Bentley, 1 Jebb & S. 246; 6 Law Rec. 353, 2nd Ser.

(*v*) Hargrave v. Shewin, 6 B. & Cress. 34; 9 D. & Ry. 20.

(*w*) Page v. Chuck, 10 Moore, 264; and see M'Calla v. Thompson, 1 Jebb & S. 63-87.

(*x*) Cossey v. Diggon, 2 B. & Ald.

546; Brown v. Sayce, 4 Taunt. 320; Serjeant v. Chafy, 5 Ad. & Ell. 354; 6 Nev. & M. 819, S. C.

(*y*) Brown v. Sayce, 4 Taunt. 320.

(*z*) Haire v. Lloyd, Vern. & Scr. 127; 1 Ridg. P. C. 341.

(*a*) Brown v. Sayce, 4 Taunt. 320.

tained rent. Where the reserved rent is made subject by Act of Parliament to a reduction for tithes(*b*), the landlord may avow for the full reserved rent, and the tenant is bound to bring himself within the provisions of the Statute. An avowry setting out a holding at a specified rent, implies that the rent is reserved payable yearly, and(*c*) not payable half-yearly; but after pleading over, it is too late to object that a defendant cannot, in such case, be supported for a half-year's rent. However, under the Irish Statute, 3 & 4 Vict. c. 105(*d*), s. 48, a Judge at Nisi Prius is authorized to allow amendments to be made in the record in matters not material to the merits, and which cannot prejudice the opponent of a party in his defence: for the purpose of obviating such variance, in pursuance of this provision, an amendment will be permitted in an avowry as to the amount(*e*) of the rent, or the period of the holding, or by substituting an avowry(*f*) at common law for a general avowry.

A party having avowed for five years' rent, ending the 25th of March 1836, the tenant pleaded that no part of the rent claimed became due, nor was any acknowledgment thereof given in writing to the avowant at any time within six years prior to the distress, and upon demurrer to the plea, it was decided(*g*) that the date mentioned in the avowry was wholly immaterial, and that neither the length of time for which the rent was claimed, nor the period to which it was claimed, was material to either of the parties. An avowant claiming double rent under the Statute(*h*), 15 Geo. II. c. 8, will not be entitled to recover the single rent in case(*i*) of failure in establishing his right under the Statute; such single rent does not constitute part and parcel of the double rent given by the Act. Upon a plea to an avowry for rent, alleging that the avowant was not landlord of the premises for all the time during which the rent mentioned in the avowry was accruing, a verdict was found for the tenant upon the issue joined: a motion being made to enter up(*j*) judgement for the avowant, notwithstanding the verdict, it appeared that the distress was made for half a year's rent due on the eleventh day of November, 1833, and that on the third of July 1834, preceding, the avowant's father died, to whom the plaintiff in re-

(*b*) *Burke v. Dignam*, 3 Irish Law Rep. 368.

(*c*) *Laycock v. Tufnell*, 2 Chitty's Rep. 531; *Sheils v. Carter*, Batty, 55.

(*d*) 3 & 4 Vict. c. 105, s. 48, Irish; 3 & 4 Will. IV. c. 42, s. 23, English.

(*e*) *Gayler v. Farrant*, 4 Bing. N. C. 286; 5 Scott, 701, S. C.; and see *Ward v. Pearson*, 5 Mees. & W. 16.

(*f*) *Roberts v. Snell*, 1 Mann. & Gr.

577.

(*g*) *Wilson v. Jackson*, 1 Jel. 636; 2 Irish Law Rep. 1, S. C.

(*h*) 15 Geo. II. c. 8, s. 9, Irish; 15 Geo. II. c. 19, s. 18, English.

(*i*) *Johnston v. Huddleston*, Cress. 938.

(*j*) *Thompson v. Shaw*, 14 L. J. 23.

id rent, and afterwards continued in occupation as tenant: the held it was unnecessary the avowant should have been landlord all the time during which the half year's rent was accruing, if he so at the end of the period, as the rent goes with the reversion and the issue joined being immaterial, judgement was ordered to be awarded for the landlord. An avowry for part of a gale's rent may be averred to, unless it be shewn(*k*) that the residue has been satisfied: because a party is not suffered to multiply actions by splitting an demand, but the landlord may include in his avowry the rent for the whole gale, and recover so much money(*l*) as he proves to be due, without regard to his having avowed for a larger sum.

A right to distrain for rent is given by several Statutes, where the right existed at common law, and in such cases, it is necessary to frame the avowry so as to bring the party distraining within the special provisions of the Statutes which afford the remedy. Where a party replevies a distress taken by a landlord, in pursuance of the Statute(*m*) 9 Anne, c. 8, s. 7, within six months after the determination of the tenant's lease, for rent which previously fell due, the avowry may be framed in the general form, but should contain an averment(*n*) that the distress was made within six months after the determination of the demise, and during the continuance of the landlord's legal interest, and of the tenant's possession. So where cattle or goods fraudulently removed from demised premises are distrained by a landlord, in pursuance of the Irish Statute(*o*) 15 Geo. II. c. 8, if the tenant replevies, the avowry may be general, containing proper averments(*p*), to bring the case within the special provisions of the Statute: but in an action of trespass for entering a party's house and taking his goods, the defendant is not authorized in pleading according to the general form, by way of justification that he entered and took the goods as a distress for rent of premises(*q*), from which such goods had been fraudulently removed, without setting out title, or stating how the demise arose, as such general form is only allowed in avowries: the objection, however, must be pointed out by spe-

Mounson v. Redshaw, 1 Saund. 401; *Holt v. Sambach*, Cro. Car. lutt. 96.
Forty v. Imber, 6 East, 434.
 9 Anne, c. 8, s. 7, Irish; 8 Anne, c. 6, English.
Staniford v. Sinclair, 2 Bing. 193; 10 M. & W. 376; *Nuttall v. Staunton*, 4 M. & W. 56; 6 D. & Ry. 155; and the form in *Braithwaite v. Cooksey*,

1 H. Bla. 465; 2 Chitty's Plead. 1051, 5th edition.
 (*o*) 15 Geo. II. c. 8, s. 1, Irish; 11 Geo. II. c. 19, s. 1, English.
 (*p*) *Poole v. Longueville*, 2 Saund. 284, A., note 2; *Thornton v. Adams*, 5 Maule & S. 38.
 (*q*) *Bowler v. Nicholson*, 4 P. & Dav. 17; 12 Ad. & Ell. 341; *Furneaux v. Fotherby*, 4 Campb. N. P. C. 136.

cial demurrer. An avowry under the Irish Statute, 15 Geo. II. c. 8(*r*) against a tenant for double rent, in not giving up possession pursuant to his notice, ought to shew(*s*) the terms of the tenancy, and that the notice to quit, actually given, was sufficient to determine the tenancy; and an avowry by executors for rent(*t*) due to their testator in his lifetime, may pursue the general form(*u*), and need not set out the landlord's title.

48. Avowries and cognizances for distress damage-*feasant* were frequently resorted to in former times for the purpose of trying title to land, but in that respect have been, in a great measure, superseded by the more convenient process of ejectment: an avowry or cognizance for distress damage-*feasant*, does not come within the Statute giving the general form of avowry(*v*), and the avowant is therefore obliged to set forth his title: if, however, the defendant in replevin has an estate of freehold in the premises, he may avow that the place of taking(*w*) is his "close, soil, and freehold," without giving any more particular statement of his title, but an allegation of seisin, without saying of what estate(*x*), or that he is possessed(*y*), or that he has title(*z*), cannot be supported on special demurrer. If a person has only a term for years in the premises, he will be obliged in his avowry to deduce(*a*) the title under which he derives through all its stages from the seisin in fee. A tenant whose lease expires, or whose holding is determined by notice to quit, though he refuses to give up possession(*b*) of the premises, cannot lawfully distrain the landlord's cattle put on the land for the purpose of taking possession. A person entitled to the exclusive vesture, herbage or feeding of land, may distrain cattle damage-*feasant*, on the premises, whether such cattle belong to the owner(*c*) of the soil or to a stranger. A demise of a dwelling-house and the milk of twenty-two cows, to be supplied by the lessor, and be pastured on a farm belonging to the lessor at a yearly rent(*d*), is

(*r*) 15 Geo. II. c. 8, Irish; 11 Geo. II. c. 19, English.

(*s*) *Humberstone v. Dubois*, 10 Mees. & W. 765; 2 Dowl. Pr. Ca. 506, N. S.

(*t*) 10 Car. I. Sess. 2, c. 5, Irish; 32 Hen. VIII. c. 37, English.

(*u*) *Meriton v. Gilbee*, 8 Taunt. 159; *Martin v. Burton*, 1 Brod. & B. 279; 3 Moore, 608; *Prescott v. Boucher*, 3 B. & Adol. 849.

(*v*) 25 Geo. II. c. 13, s. 4, Irish; 11 Geo. II. c. 19, s. 22, English.

(*w*) *Potter v. North*, 1 Saund. 347, D. note 6.

(*x*) *Saunders v. Hussey*, 1 Ld. Ray. 332, cited; 1 Carth. 9, S. C.

(*y*) *Hawkins v. Eckles*, 2 Bos. & P. 359, and the reporter's note; *Poole v. Longueville*, 2 Saund. 284, E., n. 3.

(*z*) *Reynolds v. Thorpe*, 2 Stra. 733.

(*a*) *Poole v. Longueville*, 2 Saund. 284, D., n. 3.

(*b*) *Taunton v. Costar*, 7 T. R. 43; *Butcher v. Butcher*, 7 B. & Cr. 399; M. & Ry. 220.

(*c*) Co. Litt. 4, B.

(*d*) *Burt v. Moore*, 5 T. R. 329.

effect a demise to the lessee of the exclusive use of all the grass on the farm, to be consumed by such dairy cattle, and will justify the occupier in distraining other cattle belonging to the lessor found trespassing on the premises.

49. If a person see cattle trespassing on his land(e), and the owner of the cattle drive them off for the purpose of preventing them from being distrained for the trespass, or if the cattle of their own accord leave the place, the landlord cannot afterwards seize them for trespass, as, in order to maintain a distress for cattle damage-*feasant*, the distrainer must actually(f) get into the field where the cattle are trespassing before their removal.

50. If several head of cattle are found trespassing, the caption of one of the cattle as a distress for the damage committed by the whole number(g) cannot be supported, but one of the cattle may be distrained for its own damage, or an action of trespass may be brought for the injury sustained : cattle, however, are only distrainable for the damage they are committing(h) when distrained, and not for any previous trespass.

(e) Co. Litt. 161, A.; 2 Instit. 131; *Vaspor v. Edwards*, 12 Mod. 660, by Holt, Ch. J.

(f) *Clement v. Milner*, 3 Espin. N. P. C. 95.

(g) *Vaspor v. Edwards*, 12 Mod. 660, by Holt, Ch. J.; 1 Ld. Raym. 719; Gilb. Repl. by Hunt, 28.

(h) Bull. N. P. 61.

CHAPTER VII.

REPLEVIN.

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| <p>51. <i>Plea disputing Lessor's Right to demise.</i></p> <p>52. <i>Plea of "non tenuit."</i></p> <p>53. <i>Tenant not allowed to controvert the Title of the Person from whom he got Possession.</i></p> <p>54. <i>But may shew that his Landlord has no Reversion.</i>
<i>Or, that his Title has ceased.</i></p> <p>55. <i>What Reversion sufficient to support a Distress for Rent.</i></p> <p>56. <i>Payment to a third Person having a specific Charge on the Premises.</i></p> <p>57. <i>Plea of "riens in arriere."</i></p> <p>58. <i>Rent due under a parol Demise, of equal Degree with specialty Debts.</i></p> <p>59. <i>Payment of Part of the Rent due, in Satisfaction of the Whole, no Discharge.</i></p> <p>60. <i>Acquittance by Instrument, not under Seal, only primary Evidence.</i></p> <p>61. <i>Promissory Note payable at a future Day, does not suspend</i></p> | <p><i>Right to distrain.</i></p> <p>62. <i>Irish Statute, 9 Geo. IV. c. 24, requiring Protest of negotiable Securities.</i></p> <p>63. <i>Security taken for Rent, though prosecuted to Judgement, do not extinguish the Demand.</i></p> <p>64. <i>Retainer by Executor for Debt Bond, against Rent due by Tenant.</i></p> <p>65. <i>Whether Tenant may retain a Rent in Satisfaction of Lessor's Covenant.</i></p> <p>66. <i>Plea of Levy by Distress.</i></p> <p>67. <i>Plea "de injuriâ" not allowable.</i></p> <p>68. <i>Eviction by Lessor.</i></p> <p>69. <i>Neale v. Mackenzie.</i></p> <p>70. <i>Eviction by Title Paramount.</i></p> <p>71. <i>Plea that Goods are privileged from Distress.</i></p> <p>72. <i>Tender of Rent before impoundment.</i></p> <p>73. <i>Involuntary Trespass, and Tender of Amends.</i></p> <p>74. <i>Right to plead several Pleas.</i></p> |
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51. By the common law, a landlord was obliged to set out his title in an avowry for rent(*a*), and the tenant or plaintiff in replevin might traverse any material allegation which it contained, but he was not at liberty to controvert the lessor's title or authority to make the demand, nor was he allowed to deny generally his holding(*b*) under the demand stated in the avowry: by the Statute(*c*) 25 Geo. II. c. 13, landlords were relieved from the necessity of setting out their titles in an avowry for rent, and it was considered that the tenant was precluded by operation of the Act(*d*), from disputing the landlord's right to demand the demise under which the tenant entered, either by pleading *nil inquit*, or any special plea(*e*) similar in effect, denying his landlord's title.

(*a*) *Syllivan v. Stradling*, 2 Wils. 215; *Haire v. Lloyd*, 1 Ridg. Parl. Ca. 355, by Ld. Lifford.

(*b*) *Paramor v. Chapman*, Cro. Jac. 127; *Ryan v. M'Auley*, 1 Jebb & S. 329.

(*c*) 25 Geo. II. c. 13, s. 4, Irish; 11

Geo. II. c. 19, s. 22, English.

(*d*) *Syllivan v. Stradling*, 2 Wils. 215.

(*e*) *Alchorne v. Gomme*, 2 Bing. 9 Moo. 130; *Blake v. Foster*, 8 Ad. & Ell. 487; *Partington v. Woodcock*, 5 & M. 672; 6 Ad. & Ell. 690.

: a landlord may, at his election(*f*), either avow generally under Statute, or he may avow at common law, but if he takes upon self to set out more(*g*) of title than he is required to do, he must show how he is entitled under the allegations he has chosen to make.

2. The plaintiff in replevin or tenant may plead to a general avowry under the Statute, that he did not hold or enjoy in manner or form alleged in the avowry, and this plea, which is technically called "*non tenuit*," will oblige the avowant to prove a demise or tenancy in writing for a demise, at a fixed rent, payable on the day specified in the avowry: where the premises, on which the distress was made, are holden under a demise at a fixed rent, under a contract or executory agreement in writing at a certain rent, where a stipulated rent has been paid(*i*), a general avowry may be pleaded, but if premises be occupied at a rent which is not ascertained, which cannot be ascertained by reference to a prior holding, the tenant is not liable to the proceeding by distress, and upon a plea of *tenuit* the avowant will be defeated. The verbal statements of the tenant as to the terms of his holding, are admissible in evidence on this point(*j*), although the tenancy was created by adopting the terms of a written demise in writing.

A tenant holding over after the expiration of a regular notice to quit from the landlord, is not liable to a distress for rent alleged to have become due after the determination of the holding(*k*), without evidence of a renewal of the tenancy: the landlord has his remedy by action for double value, for use and occupation, or by ejectment, the mere fact of holding over affords no ground for implying a tenancy on the old terms, so as to confer a right to distrain. A negotiation for a new tenancy at a reduced rent, after the expiration of a notice to quit by the landlord(*l*), though the tenant retains possession, clearly shews the determination of the original holding, and a distress for the original rent cannot be supported: but if the tenant submit to a distress for rent falling due after the expiration of notice to quit, the tenancy will be renewed, though the landlord's claim will be defeated

1 Co. Litt. 268, B.

Banks v. Angell, 3 Nev. & P. 10; Ry. Ld. Denman, 7 Ad. & Ell. 843,

Sheils v. Carter, Batty, 55; Layton v. Tuffnell, 2 Chitty's Rep. 531.

Knight v. Bennett, 3 Bing. 361; 10. 227; Mann v. Lovejoy, Ry. & 355; Hamerton v. Stead, 3 B. & 18; 5 D. & Ry. 206.

Howard v. Smith, 3 Mann. & Gr.

254; 3 Scott, N. R. 574; Bethell v. Blencowe, 3 Mann. & Gr. 119; 3 Scott, N. R. 568; Slatterie v. Pooley, 6 Mees. & W. 664.

(*k*) Jenner v. Clegg, 1 Moo. & Rob. 213; Bridges v. Smyth, 5 Bing. 410; 2 Moo. & P. 470; Treston v. Handcock, Smythe's Rep. 6; Daly v. Colbert, 3 Irish Law Rep. 355.

(*l*) Treston v. Handcock, Smythe's Rep. 6.

on a plea of *non tenuit*, if the distress be replevied : where rent which accrued due after the expiration of a regular notice to quit, was levied by distress(*m*), the notice was held to be waived, for if the distress were not to have that effect, the same person(*n*) might stand in the relation of tenant and trespasser to his landlord at the same time. However, where a landlord obtained a verdict in ejectment, grounded upon notice to quit, and afterwards levied by distress half a year's rent, which became due after the verdict, the Court refused to interfere(*o*), for if no tenancy subsisted between the parties, the occupier might have disputed the distress, or if a new holding was created by the distress, he might bring his ejectment.

53. It is an established rule of law, that a tenant shall not be suffered(*p*), during the continuance of his tenancy, to controvert the title of the person from whom he received possession of demised premises, or to whom he attorned or paid rent: but if an attornment be made, or rent be paid to a person from whom the tenant did not originally obtain possession of the premises(*q*), it may be shewn, on a plea of *non tenuit*, that such attornment or payment was made through ignorance, mistake or misrepresentation, to a person who had no title to the property. The plaintiff in replevin, after ejectment brought by the avowants, having signed an instrument(*r*), agreeing to attorn to them at a rent which never had been paid or demanded, it was ruled, that as the plaintiff did not get possession originally from the avowants, he was not precluded by his attornment from shewing a better title in himself. So a tenant will be permitted, in an action of debt for rent, to controvert his lessor's title, by shewing that such lessor never was in possession(*s*), nor ever had any estate in the premises, but if the lessor ever had been in possession, even as tenant at will, such evidence would not be admissible, or if the demise had been by indenture, the lessee would have been bound by the estoppel. Where a tenant paid rent to an *elegit*(*t*)

(*m*) *Zouch dem. Ward v. Willingale*, 1 H. Bla. 311.

(*n*) *Goodright dem. Charter v. Cordwent*, 6 T. R. 219.

(*o*) *Doe dem. Holmes v. Darby*, 8 Taunt. 538; *Doe dem. Holmes v. Davies*, 2 Moore, 581, S. C.

(*p*) *Jones dem. Power v. Driscoll*, 2 Huds. & Br. 552; *Rogers v. Pitcher*, 6 Taunt. 202; 1 Marsh. 541; *Cornish v. Searell*, 8 B. & Cress. 471-475; 1 Mann. & Ry. 763, S. C.; *Dancer v. Hastings*, 4 Bing. 2; *Parry v. House*, Holt's N. P. C. 489, and the note; *Hopcraft v. Keys*, 9 Bing. 613, 2 Moo. & Sc. 760; *Hall v. Butler*, 2 P. & Dav. 374; 10

Ad. & Ell. 204.

(*q*) *Rogers v. Pitcher*, 6 Taunt. 202; 1 Marsh. 541; *Cornish v. Searell*, 8 B. & Cress. 471; 1 M. & R. 703; *Alchorne v. Gomme*, 2 Bing. 54; 9 Moore, 130; *Hall v. Butler*, 2 P. & Dav. 374; 10 Ad. & Ell. 204, S. C.; *Claridge v. M'Kenzie*, 4 Mann. & Gr. 143; 4 Scott, N. R. 796.

(*r*) *Gravenor v. Woodhouse*, 1 Bing. 38; 7 Moore, 289.

(*s*) *Chettle v. Pound*, 1 Ld. Raym. 746; Bull. N. P. 177.

(*t*) *Rogers v. Pitcher*, 6 Taunt. 202; 1 Marsh. 541.

ditor, there being a prior mortgage of the premises, of which the ant had no previous notice, or where rent is paid by a lessee to his or after the lessor's title had expired(*u*), and even after the lessee notice of an adverse claim, through ignorance of the particular circumstances, the tenant is at liberty to dispute the title of the party to whom such payments were made.

If parties claim title to the same premises, under conveyances from same grantor, made at different periods, the subsequent purchaser may shew that the vendor had only an equitable title to the premises at the time of the first conveyance, and that he acquired the legal estate in the period intervening between the two grants: upon the trial of an ejectment, the lessor of the plaintiff claimed under a conveyance made in the year 1818(*v*) by the Tredegar Wharf Company, and the defendant claimed under a similar conveyance made in the year 1824 by the same company, and it was decided, although the defendant could not be suffered to allege that the company had no title in 1824, when he purchased, yet it was competent for him to establish that in 1818 the legal estate in the premises was outstanding in a trustee for the company, and had been got in by them in the interval between the years 1818 and 1824, so as to enable the company to make a valid legal conveyance to the defendant. Where a defendant in replevin avowed that one James Crosbie, being seised in his demesne as of fee, by indenture conveyed the premises to Pierce Crosbie, and his heirs(*w*), to the intent that the defendant should, during the life of James Crosbie, receive thereout a rent-charge of £100, and claimed six years' arrear of the annuity: the plaintiff in replevin having traversed the seisin in fee of James Crosbie, it appeared on the trial, that the annuity deed, which bore date in November, 1806, recited that James Crosbie was seised in fee of the lands, and it was proved that the plaintiff in replevin, after the grant of the rent-charge, took from James Crosbie as a yearly tenant: on the part of the plaintiff in replevin, a settlement dated in May, 1788, long prior to the grant of the rent-charge, was given in evidence, by which the lands were limited to James Crosbie for his life, and the seisin in fee of James Crosbie being negatived by the verdict, the Court held that by joining issue on the seisin in fee, the avowant waived his right to rely on the estoppel arising

(*u*) *Fenner v. Duplock*, 2 Bing. 10; *Moore*, 38; *Gregory v. Doidge*, 3 Bing. 474; 11 *Moore*, 394; *Doe dem. v. Brown*, 7 Ad. & Ell. 447; 2 *v. & P.* 592; *Williams v. Bartholomew*, 1 Bos. & P. 326; *Claridge v.*

M'Kenzie, 4 Mann. & Gr. 143; 4 *Scott*, N. R. 796.

(*v*) *Doe dem. Oliver v. Powell*, 1 Ad. & Ell. 531; 3 *Nev. & Mann.* 616, S.C.

(*w*) *Duggan v. O'Connor*, 1 *Huds. & Br.* 459.

ing from the recital in the grant of the rent-charge, and that the plaintiff was not precluded from shewing his lessor to be only tenant for life. A party having entered into possession under a tenant who had paid rent under a distress, though the landlord(*x*), on the trial of a replevin suit, inadvertently produced in evidence a document shewing that the original tenant held the premises by virtue of a lease, to which the defendant in replevin was a stranger, it was ruled that the occupier, deriving under a person who had submitted to a distress for rent, was estopped from controverting a title in which the original tenant acquiesced.

54. A tenant is at liberty, upon the plea of *non tenuit*, to prove that the interest which his lessor had claimed(*y*) in the premises at the time of making the demise, subsequently determined, or he may shew that his landlord had only a defeasible title(*z*) at the time of the demise, which had been defeated before the rent alleged to be in arrear incurred due, and that the tenant entered into a new agreement with the person who recovered by title paramount, or the tenant may prove that the distrainer(*a*) to whom he had paid rent, only held under an agreement for a lease, which had not been carried into effect, and that the legal owner, from whom the tenant originally got possession, claimed the rent, or that after making the demise the lessor(*b*) granted his reversion in the premises to a third person, or that the supposed demise was in effect an assignment(*c*) of all the grantor's estate, and that the distrainer had no reversion in the premises. A mortgagor, after granting premises in mortgage, demised them for three years, and the interest of the debt being in arrear, he gave the mortgagee a written authority to receive the rent, which was communicated to, and acted upon by the lessee: the mortgagor(*d*) having revoked the autho-

(*x*) *Cooper v. Blandy*, 1 Bing. N. C. 45; 4 Moo. & Sc. 562, S. C.; *Doe dem. Wheble v. Fuller*, Tyrw. & Gr. 17; *Dolby v. Iles*, 11 Ad. & Ell. 335; 3 P. & Dav. 387.

(*y*) *England dem. Syburn v. Slade*, 4 T. R. 682; *Doe dem. Jackson v. Ramsbotham*, 3 M. & Selw. 516; *Neave v. Moss*, 1 Bing. 360; 8 Moo. 389; *Doe dem. Strode v. Seaton*, 2 Cro. M. & Rosc. 728; Tyrw. & Gr. 19; *Brudnell v. Roberts*, 2 Wils. 143; *Blake v. Foster*, 8 T. R. 487; *Downs v. Cooper*, 1 Gale & Dav. 573; 2 Q. B. Rep. 256, and see a special plea of *non tenuit* in this case; *Claridge v. M'Kenzie*, 4 Mann. & Gr. 143.

(*z*) *Hopcraft v. Keys*, 9 Bing. 613; 2

Moo. & Sc. 760; *Pope v. Biggs*, 9 B. & Cr. 245; 4 M. & Ry. 193.

(*a*) *Brook v. Biggs*, 2 Bing. N. C. 572; 2 Scott, 803; *Doe dem. Marriott v. Edwards*, 5 B. & Adol. 1065; 3 Nev. & M. 193; 6 Carr. & P. 208; *Waddilove v. Barnett*, 2 Bing. N. C. 588; 2 Scott, 763.

(*b*) *Doe dem. Lowden v. Watson*, 2 Stark. N. P. C. 230.

(*c*) *Pluck v. Digges*, 2 Huds. & Br. 1; 5 Bligh, P. Ca. 31; 2 Dow. & Cl. 180; *Rankin v. Newsam*, 1 Huds. & Br. 70; *Preece v. Corrie*, 5 Bing. 24; 2 Moo. & P. 57; *Pascoe v. Pascoe*, 5 Bing. N. C. 898; 5 Scott, 117.

(*d*) *Wheeler v. Branscombe*, 17 Jurist, 1131.

ity a few days before a gale of the rent fell due, afterwards demanded payment, and distrained for the amount: the tenant replevied, and upon a plea of *non tenuit*, it was ruled that the lessee could not resist the mortgagor's claim, where the rent had not been previously paid to the mortgagee.

55. A yearly tenant, underletting from year to year, has a reversion(e) which entitles him to distrain: a tenant for a term of years having underlet part of the demised premises from year to year, at a rent payable quarterly, after the expiration of his term agreed with the chief landlord to hold on from month to month, and it was ruled(f) that the under-tenant's holding continued, determinable on his lessor's monthly tenancy, and that the lessor, though merely a monthly tenant, retained a reversion in the premises which he had demised from year to year, and had a right to enforce payment of the rent by distress. A lease made under a leasing power is referrible to the deed creating the power, and has the same effect as if the term created by the demise had been incorporated in, and limited by the deed itself: a lease executed under a power more than a year after the execution of the deed creating the power, was held to be contemporaneous(g) with a trust-term for one thousand years created by the settlement: and as the trustees of the term were parties to the deed, the lease was held binding on them, and it was ruled they had a reversion in the premises comprised in the lease, which enabled them to maintain a distress for the rent in arrear.

56. A set-off is not admissible, either by plea(h) or by notice(i), as an answer to an avowry for rent, but the tenant has a right to plead specially, that at the time of making the demise, the premises were subject to certain head-rents or other encumbrances, and that he was(j) obliged, under threat of distress(k), to apply the reserved rent in payment of such outgoings. In like manner, it may be shewn that the tenant paid a sum equivalent to the rent in arrear(l) at the time of dis-

(e) *Curtis v. Wheeler*, Moo. & M. 493; *Pike v. Eyre*, 9 B. & Cress. 909; 4 M. & Ry. 681, S. C.

(f) *Peirse v. Sharr*, 2 Mann. & Ry. 418; *Mackay v. Mackreth*, 4 Doug. 213; 2 Ch. Rep. 461, S. C.; *Parker v. Harris*, Skinn. 307.

(g) *Rogers v. Humphreys*, 4 Ad. & Ell. 299; 5 Nev. & M. 511, S. C.

(h) *Sapsford v. Fletcher*, 4 T. R. 511; *Laycock v. Tuffnell*, 2 Ch. Rep. 531.

(i) *Absalom v. Knight*, Barnes, 450; Bull. N. P. 181.

(j) *Sapsford v. Fletcher*, 4 T. R. 511; *Carter v. Carter*, 5 Bing. 406; 2 Moo. & P. 723; *Wilkinson v. Cawood*, 3 Anstr. 909.

(k) *Woods v. Rock*, Alc. & Nap. 57; but see *Carter v. Carter*, 5 Bing. 406; 2 Moo. & P. 723.

(l) *Taylor v. Zamira*, 6 Taunt. 524; 2 Marsh. 220; *Johnson v. Jones*, 9 Ad. & Ell. 809; 1 P. & Dav. 651.

training, to a mortgagee of the premises, or to a grantee of a rent charge issuing out of the premises, and that the mortgage or rent charge was created prior to the demise, or the tenant may plead that he paid taxes(*m*), to which the lessor was liable in respect of the premises, and deducted the amount(*n*) out of the rent payable for the current year, when they were respectively discharged; but such payments must be made in respect of charges upon the demised premises(*o*), which the landlord was bound to satisfy. However, if the landlord or his agent acquiesce in a yearly deduction(*p*) made by a tenant from his rent, or if the tenant for several years(*q*) omit to deduct from his rent annual payments, with which he had a right to charge his landlord, in either case, though done inadvertently, such sums cannot be recovered back by a party who had full opportunity of knowing the facts.

57. A plea alleging that no rent is in arrear (*riens in arriere*), admits the demise(*r*) as stated in the avowry, and renders it necessary for the plaintiff in replevin to shew that the whole of the rent claimed has been satisfied, for the landlord is entitled to recover(*s*) any portion of the rent demanded, which was owing at the time of making the distress. Upon this issue, payment of rent(*t*) to the chief landlord, or of a rent-charge issuing out of the premises, and created either before the lessor's title commenced(*u*), or before making the demise, or payment of taxes(*v*) to which the landlord was liable in respect of the premises, or of interest(*w*) due on foot of a mortgage affecting the premises, may be given in evidence.

58. A debt due for rent issuing out of demised premises ranks in equal degree with debts due by bond(*x*), or other specialties, and it is immaterial whether such rent be reserved on a demise by parol(*y*), or by

(*m*) *Clennell v. Read*, 7 Taunt. 50; 2 Marsh. 371; *Grant v. Fowler*, 4 Law Rec. 21, 2nd Ser.

(*n*) *Stubbs v. Parsons*, 3 B. & Ald. 516; *Andrew v. Hancock*, 1 Bro. & B. 37; 3 Moo. 278; *Bramston v. Robins*, 4 Bing. 11; 12 Moor. 68.

(*o*) *Davies v. Stacey*, 4 P. & Dav. 157; 12 Ad. & Ell. 506, S. C.

(*p*) *Bramston v. Robins*, 4 Bing. 11; 12 Moo. 68.

(*q*) *Andrew v. Hancock*, 1 Bro. & B. 37; 3 Moo. 278; *Spraggs v. Hammond*, 2 Bro. & B. 59; 4 Moo. 431; *Stubbs v. Parsons*, 3 B. & Ald. 516.

(*r*) *Hill v. Wright*, 2 Espin. N. P. C. 669; *Cossey v. Diggon*, 2 B. & Ald. 548.

(*s*) *Harrison v. Barnby*, 5 T. R. 246;

Cobb v. Bryan, 3 Bos. & P. 328.

(*t*) *Sapsford v. Fletcher*, 4 T. R. 511; *Carter v. Carter*, 5 Bing. 406; 2 Moo. & P. 703.

(*u*) *Taylor v. Zamira*, 6 Taunt. 524; 2 Marsh. 220; *Johnson v. Jones*, 9 Ad. & Ell. 809; 1 P. & Dav. 651.

(*v*) *Clennell v. Read*, 7 Taunt. 50; 2 Marsh. 371; and see *Grant v. Fowler*, 4 Law Rec. 21, 2nd Ser.

(*w*) *Dyer v. Bowley*, 2 Bing. 94; 9 Moo. 196; *Johnson v. Jones*, 9 Ad. & Ell. 809; 1 P. & Dav. 651; *Kingsmill v. Watson*, 2 Huds. & Bro. 608.

(*x*) *Stonehouse v. Ilford*, 1 Com. Rep. 145.

(*y*) *Newport v. Godfrey*, 3 Lev. 267; 2 Ventr. 184; 4 Mod. 44; *Gage v. Aton*, 1 Freem. 512; 1 Com. Rep. 67;

, because, in both instances, the rent arises from the profits of and is regarded as a specialty debt, nor will the quality of be varied by reason of the expiration of the demise, because act remains, as it is said, in the realty: hence rent growing at time of the landlord's decease, and becoming payable on the next after his death, is of equal degree with rent(*z*) which due in his life-time.

Payment of part of an ascertained debt(*a*), or of part of an ar-
rent, or the acceptance of a security of equal degree for a smaller
the amount of such demands, will not constitute satisfaction
due, although the creditor or landlord agree to receive the
n in full discharge and satisfaction, and give a receipt for
sum claimed: there must be some consideration for the re-
ment(*b*) of the rest of the debt; something collateral to shew
bility of benefit to the party for relinquishing his further claim,
the agreement is *nudum pactum*, and a mere promise to pay
nder, when of ability, puts the creditor in no better condition
as before: a plea of payment of a smaller sum(*c*) of money
ction of a demand for a larger sum is bad on demurrer, and is
by verdict.

A receipt or written acknowledgment of payment of a debt, or
ar of rent, is merely *primâ facie* evidence of the fact of pay-
d may be shewn(*d*) to have been obtained by fraud, or given
ce, but a release of the demand under seal, although(*e*) fraudu-
ocured, can only be avoided by the interposition of a Court of
a receipt given by one of two co-plaintiffs, without considera-
not be suffered, even upon the trial of the action(*f*), to de-
claim of the co-plaintiff, but an acquittance *under seal*(*g*) of
at a later day is a bar to an avowry for rent due on a former

. 515; Carth. 511; 1 Salk.
lod. 288.

umpson v. Thompson, 9 Price,

nber v. Wane, 1 Stra. 426;
utton, 5 East, 232; 1 Smith's
; Thomas v. Heathorn, 2 B.
177; 3 D. & Ry. 647; Watters
2 B. & Adol. 889; and see
;" Book V. c. 13, s. 11.

ch v. Sutton, 5 East, 232; Ri-
Bartlett, 1 Leon. 19.

wn v. Hatcher, 10 Ad. & Ell.
& Dav. 292; Wright v. Acres,
Ell. 720; 1 Nev. & P. 761,

(*d*) Skaife v. Jackson, 3 B. & Cress.
421; 5 D. & Ry. 290; Graves v. Key,
3 B. & Adol. 313; Straton v. Rastall,
2 T. R. 366; Benson v. Dennett, 1
Campb. N. P. C. 394, note; Bristow v.
Eastman, 1 Espin. N. P. C. 172; Farrar
v. Hutchinson, 9 Ad. & Ell. 641; 1 P.
& Dav. 437, S. C.; Coomes v. Denne, 2
Keble, 346; and see title "Payment,"
post.

(*e*) Baker v. Dewey, 1 B. & Cr. 704;
3 D. & Ry. 99; Rountree v. Jacob, 2
Taunt. 140.

(*f*) Skaife v. Jackson, 2 B. & Cr.
421; 5 D. & Ry. 290.

(*g*) Bull. N. P. 56.

day, though if the instrument be not sealed, contrary proof will be received. So a receipt for purchase money in the body(*h*) of a deed of assignment, is, at law, binding between the parties, but a receipt for the money endorsed on the deed, not being under seal, cannot amount to an estoppel, and evidence is admissible to shew(*i*) that the consideration was not actually paid. However, a receipt passed for the tenant's rent, or for rent to a specified day, affords strong(*j*) presumptive evidence that all preceding rent has been discharged, though such voucher may be contradicted or explained(*k*), and an avowry for rent due on a certain day, and recovery of the amount, will not preclude the landlord from levying by distress a prior arrear of rent remaining unpaid.

61. A promissory note payable at a future day, passed by a tenant for his rent, does not suspend the landlord's right of distress(*m*), and an agreement in writing, not under seal, cannot extend(*n*) or enlarge the time for payment of a specialty debt, and the demand remains undiminished till payment: but if a tenant endorse a promissory note or bill of exchange to his landlord for an arrear of rent, and obtain a receipt for the amount as money when paid, and the security be lost, by neglecting to demand payment(*o*) in due time, the rent for which it was given will be extinguished: it is a general rule, applicable to negotiable instruments, and not to be relaxed in particular instances, though they are taken in payment(*p*) of a pre-existing debt, they operate as a discharge of that debt, unless the holder does all that the law requires in order to obtain payment of the securities; he must present them and communicate without delay notice of non-payment.

62. By the Irish Statute(*q*), 9 Geo. IV. c. 24, it is enacted, that if any person shall receive any bill of exchange or promissory note or in satisfaction of any former debt, the same shall be esteemed a

(*h*) *Rountree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & Cr. 704; 3 D. & Ry. 99; *Bottrell v. Summers*, 2 Yo. & Jerv. 407.

(*i*) *Lampon v. Corke*, 5 B. & Ald. 606; 1 D. & Ry. 211; 3 Sugd. Vend. 193, note.

(*j*) *Gilb. Evidence*, 142; 2 Stark. Evidence, 702.

(*k*) *Graves v. Key*, 3 B. & Adol. 318.

(*l*) *Palmer v. Stanage*, 1 Lev. 43; 1 Siderf. 44; Thos. Raym. 21; 9 Vin. Abr. 157; *Distress*, O. 2, pl. 24; *Gambrell v. Ld. Falmouth*, 4 Ad. & Ell. 73.

(*m*) *Davis v. Gyde*, 2 Ad. & Ell. 623; 4 Nev. & M. 462; *Palfrey v. Baker*, 3

Price, 572; *Curtis v. Rush*, 2 Ves. 416; *Basset v. Wood*, Litt. Rep. cited; *Ralph Baker's case*, Year 11 Hen. IV. fo. 79, pl. 21; *Harri Shipway*, Bull. N. P. 182.

(*n*) *Mease v. Mease*, 1 Cowp. 47.

(*o*) *Ewer v. Clifton*, Bull. N. P. *Smith v. Wilson*, Andr. 190.

(*p*) *Camidge v. Allenby*, 6 B. & Cress. 373, by Bayley, J.; *Rogge Langford*, 1 Cro. & Mees. 637; 3 T. 654; *Beeching v. Gower*, Holt's N. 315, note.

(*q*) 9 Geo. IV. c. 24, s. 6, Irish; is no corresponding English Act.

lete payment of such debt, if such person so receiving such bill or note shall not use due diligence to obtain payment thereof, by endeavouring to get such bill accepted and paid, or such note paid, and also *make his protest*, either for non-acceptance or non-payment thereof, or otherwise give due notice of the dishonour thereof: provided that nothing therein contained shall extend to satisfy or discharge any other or different security or remedy for the same debt against the drawer, acceptor, or endorser of such bill, or the maker or endorser of such note.

63. The acceptance of a bond by a landlord for rent due to him, does not extinguish the rent, as a security(*r*) of equal degree does not discharge the debt for which it is passed: a security for payment of a debt, which in itself does not operate as an extinguishment of the original demand, cannot have that effect by being pursued to judgement, and if it does not produce satisfaction *in fact*, the claimant may resort to his original remedy. Upon a demise of coal-mines to three persons, who covenanted to pay a sum of money by instalments, one of the covenantees(*s*) gave his promissory note in payment of one of the instalments, and the landlord having recovered judgement on the note against the covenantee, it was ruled that the judgement being unproductive, was not a bar to an action against all the lessees for breach of the covenant: in general, where a security by simple contract is given for a debt, it is extinguished by a specialty-security, if the remedy given(*t*) by the latter is co-extensive with that which the creditor had upon the former, but the new security cannot have any such effect, where it appears that the parties intended the original should remain in force. However, after judgement in an action of debt against a lessee for an arrear of rent, the specialty debt is extinguished in a debt of a higher degree, and the remedy by distress being incident to the rent, will be defeated for any portion of the rent comprised in the judgement.

64. An executor may plead a retainer in satisfaction(*u*) of a debt due to him by the testator's bond, in an action of debt for rent due by the testator, as both debts are of equal degree; and in like manner, a debt for rent due by the testator may be retained by his executor in discharge of a bond-debt due by him to the testator: but in an action for recovery of rent due by a testator, whether reserved by deed or by parol,

(*r*) *Higgins's case*, 6 Rep. 44; *Basset v. Wood*, Litt. Rep. 17, cited; *Newport v. Godfrey*, 2 Ventr. 184; 3 Lev. 267; 3 Bull. N. P. 182.

(*s*) *Drake v. Mitchell*, 3 East, 251; *Sterry v. Preston*, 2 Chitty's Rep. 245; *Rush v. Purcell*, 3 Cr. & Dix, 162.

(*t*) *Twopenny v. Young*, 3 B. & Cress. 208; 5 D. & Ry. 259.

(*u*) *Gage v. Acton*, 1 Com. Rep. 67; 1 Salk. 325; *Carth.* 511; 1 *Ld. Raym.* 515; *Stonehouse v. Ilford*, 1 Com. Rep. 145.

the executor(*v*) cannot plead outstanding unsatisfied specialty debts **due** by testator, for being of equal degree, one cannot be a bar to the other.

65. If rent of so much a year be reserved, and by the same deed the lessor agree to allow so much at every payment for bringing the rent, this shall not be *recouped* as a diminution(*w*) or alteration of the rent, but is a covenant for allowance, and does not operate in *defalcation* of the rent. It appears, however, that a tenant may shew, under a plea of *riens in arrere*, that his lease contains a covenant(*x*) to allow out of the reserved rent, any sums of money expended by him in repairing the premises, and that he will be entitled to credit for such sums as were disbursed by him in suitable repairs: but unless the lease expressly stipulate that the disbursements in repairs shall be deemed equivalent to payment of the rent, the tenant must resort to a cross-action, as a set-off is not admitted in replevin: and a Court of Equity cannot give relief where the tenant(*y*) claims to set-off a legal demand against rent due to the landlord.

66. A plea that the sum sought to be recovered(*z*), and all damages sustained by the landlord(*a*) were levied and satisfied by means of a former distress, is a good answer to an avowry for rent, but a plea of a former distress for the same rent, without averring satisfaction, cannot be supported: a tenant, however, may plead to an action of debt for rent, that his goods were distrained for the same rent, and then remained under seizure, because the debt(*b*) is, for the time, suspended by the distress.

67. A plea to an avowry for rent, that the defendant took the distress of his own wrong(*c*) without any such cause as alleged (*de injuria sua propria*), if demurred to cannot be sustained, as no such plea is allowable in matters relating to any interest in land, but when pleaded to an avowry for distress damage-feasant(*d*), it was held sufficient after verdict.

(*v*) *Newport v. Godfrey*, 2 Ventr. 184; 3 Lev. 267; *Thompson v. Thompson*, 9 Price, 464.

(*w*) Com. Dig. Rent. C. 3; *Mason v. Chambers*, Cro. Jac. 34; Yelv. 42-47; *Davies v. Stacey*, 12 Ad. & Ell. 506; 4 P. & Dav. 157, S. C.; *Burroughs v. Hays*, Comb. 21; Year Book, 14 Hen. IV. fo. 27, pla. 35; Bro. Abr. Dette. pl. 72.

(*x*) *Woods v. Rock*, Alc. & Nap. 57; *Taylor v. Beale*, Cro. Eliz. 222; 1 Leon, 237, pla. 320; *Baylye v. Hughes*, Cro. Car. 137; *W. Jones*, 242; *Johnson v. Carre*, 1 Lev. 152.

(*y*) *Townrow v. Benson*, 3 Madd. 203.

(*z*) *Hudd v. Ravenor*, 3 Bro. 8 B. 662; 5 Moore, 542; *Lingham v. Warren*, 3 Bro. & B. 36; 4 Moore, 409; *Lear v. Edmonds*, 1 B. & Ald. 157; 2 Chitty's Rep. 301, S. C.

(*a*) *Lees v. Wright*, 1 Dowl. & Ry. 391.

(*b*) *Edwards v. Kelly*, 6 M. & Selw. 209, by Holroyd, J.

(*c*) *Jones v. Kitchen*, 1 Bos. & Pul. 76; *Poole v. Longueville*, 2 Saund. 28 D. n. 3.

(*d*) *Mahady v. Gallagher*, Irish Ten. Rep. 159.

68. If a tenant be unlawfully deprived of possession(*e*) of the whole, or of any part, of demised premises by his lessor, the rent will be suspended until the lessee be reinstated : a plaintiff in replevin may plead an avowry for rent, that after making the demise, and before any part of the rent distrained for, accrued due, the avowant entered(*f*) upon the whole, or upon some part, of the demised premises, and expelled the plaintiff from his possession thereof, and kept him so expelled until after the rent alleged to be in arrear became due : the tenant, however, must be evicted, or expelled out of all or some part, of the demised premises, in order to occasion a suspension of rent ; and a plea alleging that the avowant unlawfully entered(*g*) upon part of the premises, and pulled down the roof and ceiling of a summer-house, part thereof, by reason of which the tenant was deprived of the use of the summer-house from thence until the taking of the distress, was held sufficient, on demurrer, because the facts amounted only to a trespass, and not to an eviction : the plea of eviction by the lessor must show that the tenant was kept out of possession until after the day on which the(*h*) rent was made payable, as the rent revives on the re-entry of the lessee.

69. If there be an outstanding lease for ten years unexpired, and a second(*i*) lease is granted of the same premises for the same, or for a shorter period, to begin at the same time, the second lease, if made by deed, passes the rent and reversion to the second lessee, but if granted by an instrument not under seal, or by parol, is absolutely void : after a person had entered by virtue of a parol demise of a dwelling-house and land for the term of one year, it appeared that eight acres of the demised premises had been previously let by the same lessor for a term then in being, to one Adam Charlton, who retained possession, and the landlord having distrained upon the second lessee for half a year's rent, was ruled, in an action of trespass(*j*) for making such distress, that the new tenant, who was plaintiff in the action, took an "*interesse termini*" in the eight acres, and that the outstanding interest of Adam Charlton in that part, was to be deemed rather in nature of an eviction of title paramount, than by any tortious act of the lessor, and that

(*e*) Walker's case, 3 Rep. 22, B. ; Co. Litt. 148, B.

(*f*) Salmon v. Smith, 1 Saund. 204, 252, 2; Neale v. Mackenzie, 2 Cro. M. & Rosc. 84-101; 5 Tyrw. 1106.

(*g*) Hunt v. Cope, Cowp. 242; Roper v. Lloyd, Thos. Jones, 148; Hodgskin v. Greenborough, Willes, 129; Harrison's case, Clayton's Rep. 34.

(*h*) Timbrell v. Bullock, Style, 446; Page v. Parr, Style, 432.

(*i*) Shepp. Touchst. 276; Bac. Abr. Leases, N.; Dove v. Willott, Cro. Eliz. 160; Com. Dig. Estates by Grant, G. 13.

(*j*) Neale v. Mackenzie, 2 Cro. M. & Rosc. 84; 5 Tyrw. 1106, S. C.

during the continuance of such interest in the eight acres, after the lessee had entered into possession of the residue, the rent was actionable, and might be recovered by distress. The judgement in the preceding case, however, was reversed, and Lord Denman, Ch. delivering the opinion of the court of error(*k*), observed that the right of distress incident to the new tenant in taking possession was not analogous to an eviction, because it appeared that no interest in the eight acres had previously demised to Adam Charlton, passed to the new tenant by the subsequent demise, and that the new tenant did not take an "*inter termini*" in those eight acres, so as to give him a right to a tenancy for one year in such part during the period of his own lease, because the demise to Adam Charlton covered the whole term for which distress was made: and that as the new tenant did not take any interest in, and had no enjoyment in that part of the land comprised in the demise, and was not bound by any estoppel, the landlord's distress was not justified in respect of the whole, or for any portion of the land reserved.

Where tithes and a homestead for collecting them, were let by an instrument not under seal at an entire rent, it was ruled(*l*) that distress for the rent could not be sustained, because the instrument did not operate as a demise of the tithes for want of a seal, and no certain or ascertained rent was reserved for the homestead, for though tithes only issues out of the homestead in point of remedy, yet it issues out of both tithes and homestead in point of render.

70. Upon eviction by title paramount, the tenant, in order to excuse himself from payment of rent to his lessor, must prove that the person(*m*) evicting had good title, and a plea of eviction by a stranger must set out(*n*) the title of the person evicting, and must also aver that such person did not come in under title(*o*) derived from the tenant's title in replevin: eviction by the lessor, and, in ordinary cases, even by title paramount(*p*) must be pleaded specially, but where the title of a lessee is determined by a *bonâ fide* eviction of the whole of the demised premises, such evidence will support(*q*) a plea of *non*

(*k*) *Neale v. Mackenzie*, in error, 1 Mees. & W. 747.

(*l*) *Gardiner v. Williamson*, 2 B. & Adol. 336; *Bird v. Higginson*, 2 Ad. & Ell. 696; 4 Nev. & M. 505; 6 Ad. & Ell. 824; *The Queen v. Hockworthy*, 2 Nev. & P. 391; 7 Ad. & Ell. 501; *Tomlinson v. Day*, 2 Brod. & B. 681; 5 Moore, 558; *Dalston v. Reeve*, 1 Ld. Raym. 77.

(*m*) *Jordan v. Twells*, Cases temp.

Hardw. 171; *Salmon v. Smith*, 204, note 2, &c.

(*n*) *Smith v. Wood*, C. B. of Easter, 1820, MSS.

(*o*) *Wotton v. Hele*, 2 Saund note 10; *Brookes v. Humphreys*, N. C. 55; 6 Scott, 756.

(*p*) *Salmon v. Smith*, 1 Saund note 2.

(*q*) *Hopcraft v. Keys*, 9 Binn. 2 Moo. & Sc. 760, S. C.

may be maintained for an apportionable rent, after eviction of the demised premises by title paramount, but there can(*r*) be no apportionment where the lessee was at some period subject to the rent by virtue of the demise, and the lessor is not entitled to the rent at all, so long as the tenant is kept out of possession of any premises by the wrongful act of his landlord.

A plaintiff in replevin may also plead any matter in bar of an action for the rent, shewing that the goods or cattle seized were privileged in any manner exempted from liability to distress, or that the distress was wrongful. It may be pleaded to an avowry for the plaintiff's horse(*s*), when distrained, was standing in the public inn, where the plaintiff was a guest, or that certain goods were demised along with a public inn, and that the cattle distrained on their way to market(*t*), were put on the lands for one year, or that the goods were distrained on the premises of a factor, broker, artist(*u*), or manufacturer, where they were deposited by the plaintiff in the usual course of trade, or that the cattle or goods at the time of distraining were in actual use, or were in the custody of the plaintiff, or that the distress was made on Sunday(*x*), or after sunset, or before sunrise, or that the cattle distrained had been abused in any manner(*z*) as to make the party distraining a trespasser *ab initio*, or to render the distress unlawful: where cattle or goods are distrained for rent, and the distrainer is solvent, it is more prudent to seek compensation for the injury in an action for trespass, or on the case, than to hazard a replevin suit.

Tender of the rent in arrear, either before(*a*) or at the time of distraining(*b*), renders the distress tortious, and tender of the rent along with the charges of distraining, after making a distress, and before(*c*) distraining, either to the landlord himself(*d*) or to the bailiff hav-

v. Mackenzie, 1 Mees. & W. 100.

ave v. Middleton, Winch's Case, 1 Salk. 250.

es v. Joyce, 3 Lev. 260; 2 Salk. 250; *Nugent v. Kirwan*, 1 Jebb 7.

son v. Hartopp, Willes, 512; *Hurst*, 1 Salk. 250.

v. Burley, Cro. Eliz. 549; *Jogan*, 9 Bing. 676; 3 Moo. 100.

ock n. Purvis, 2 Brod. & B. 100; *ore*, 79; *Wright v. Dewes*, 1. 641; 3 Nev. & M. 790.

p. Abr. 566, Distress; *Les-v. Chambers*, Hayes, 544.

(*y*) Year Book, 11 Hen. VII. fo. 5, pl. 18; Co. Litt. 142, A.; Bro. Abr. Distress, pl. 99; Vin. Abr. Distress, O. 2 pl. 12.

(*z*) *Connor v. Bentley*, 1 Jebb & S. 246-252; 6 Law Rec. 357, by Burton, J.

(*a*) The Six Carpenters' case, 8 Rep. 147, A.; 2 Instit. 107; and see *ante*, page 541.

(*b*) *Fortescue v. Jones*, Noy. 22.

(*c*) *Evans v. Elliott*, 6 Nev. & M. 606, and the notes; 5 Ad. & Ell. 142; *Browne v. Powell*, 4 Bing. 230; 12 Moo. 454; *Thomas v. Harries*, 1 Mann. & Gr. 695; 1 Scott's N. R. 524.

(*d*) *Smith v. Goodwin*, 4 B. & Ad. 413; 1 Nev. & M. 371.

ing authority(*e*) to distrain, entitles the tenant to have his goods stored, and makes any subsequent detainer wrongful, but tender and impounding comes too late. A tenant having declared in replevin *taking* and unjustly detaining his goods, the landlord avowed the taking as a distress for rent, to which the tenant pleaded, that after the taking and before(*f*) the impounding, he tendered the rent, and that at such tender the landlord unjustly detained the goods : upon demurrer the plea was held good, as every unlawful detention is to be considered a new taking, for which replevin is maintainable : however, a tender should be made without imposing any condition(*g*), as it will be invalidated, if the person making the tender refuse to pay the money, unless a receipt be given.

Where rent is reserved payable at a place(*h*) off the land, with a clause that if the rent be behind, after being lawfully demanded at such place, then the landlord may distrain ; a distress for the rent cannot be supported without a previous demand on the gale-day at the appointed place, as the place appointed by law for payment is altered by agreement of the parties : if the lease do not specify any particular place for payment of the rent, the tenant may attend(*i*) upon the premises a reasonable time before sunset on the gale-day, and in the presence of a witness competent to prove the fact, produce the money and offer to pay it, and continue on the land until sunset for the purpose ; and such tender, though made in the landlord's absence, may be pleaded to an action of debt for the rent ; and in order to enable the landlord to recover, a subsequent demand of the rent must be made at the land, or of the person of the debtor.

If a tenant tender his rent at the time of distraining, or before impounding, and the landlord refuse to accept the money, he shall nevertheless afterwards have return(*j*) of the goods, though the rent be in arrear, because the distress is only a pledge for the rent, and when the rent is offered the pledge ought to be restored : consequently, the Court never award the return of the pledge to the landlord, which he ought to have restored to the tenant before the replevin was sued out.

(*e*) *Ladd v. Thomas*, 12 Ad. & Ell. 117 ; 4 P. & Dav. 9 ; *Horn v. Luines*, 12 Mod. 354, by Holt, Ch. J. ; *Pilking-ton's case*, 5 Rep. 76, A., note B. ; Cro. Eliz. 813.

(*f*) *Evans v. Elliott*, 5 Ad. & Ell. 142 ; 6 Nev. & M. 606.

(*g*) *Smith v. Goodwin*, 1 Nev. & M. 373 ; *Marq. of Hastings v. Thorley*, 8 Carr. & P. 573.

(*h*) *Gilb. Rents*, 78 ; *Browne v. Livery*, Hob. 208 ; 2 Ro. Abr. 426, 1 (1. pl. 3) ; *Vin. Abr. Rent*, (1. pl. Maund's case, 7 Rep. 28.

(*i*) *Tinckler v. Prentice*, 4 T. 549 ; *Crouch v. Fastolfe*, Thos. R. 418 ; *Horne v. Lewin*, 1 Ld. R. 641 ; 2 Salk. 583 ; 12 Mod. 352 ; *Coley v. Kingswell*, Hob. 207.

(*j*) *Gilb. Distress*, 214.

An avowant may take issue on the fact of tender, or may reply a subsequent demand and refusal, and in order to support the replication, proof will be requisite that the precise sum(k), which was tendered, was demanded by a person having authority(l) to receive the money: growing crops distrained for rent may be redeemed by tendering the rent and charges at any time before such crops have been saved and gathered.

73. By the Irish Statute(m), 10 Car. I. Sess. 2, c. 6, it is enacted, that in all actions of trespass *quare clausum fregit* wherein the defendant shall disclaim in his plea to make any title or claim to the land, in which the trespass is, by the declaration, supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence, or involuntary, and a tender or offer of sufficient amends for such trespass before action brought. The provisions of this Statute are confined to actions of trespass *quare clausum fregit*, and are not applicable(n) to replevin suits. In an action of trespass *quare clausum fregit* the defendant pleaded an involuntary trespass, and that before action brought he tendered twenty-five shillings, being sufficient amends(o), it was ruled, that the plaintiff either should deny the tender of the money, or should reply that the sum tendered was insufficient, but that a denial of the tender of sufficient amends was bad on demurrer.

74. A plaintiff in replevin is authorized, by the Irish Statute(p), 6 Anne, c. 10, in any Court of Record, to plead as many several matters, with leave of the Court, as he shall think necessary: a plaintiff in replevin has been allowed to plead to an avowry for rent(q) *non tenuit, riens in arriere*, and his own infancy, and upon special grounds leave was given to plead *non tenuit* along with a tender(r).

(k) John v. Jenkins, 1 Cro. & M. 237; 3 Tyrw. 170; Rivers v. Griffiths, 5 B. & Ald. 630.

(l) Pimm v. Grevill, 6 Espin. N.P.C. 95; as to the effect of proof of tender on a plea of *non tenuit*, see Knight v. Macdonall, 12 Ad. & Ell. 438; 4 P. & Dav. 168.

(m) 10 Car. I. Sess. 2, c. 6, s. 16, Ir.;

21 Jac. I. c. 16, s. 5, English.

(n) Allen v. Bayley, 2 Lutw. 1596.

(o) Williams v. Price, 3 B. & Adol. 695.

(p) 6 Anne, c. 10, s. 4, Irish; 4 Anne, c. 16, s. 4, English.

(q) Wilson v. Ames, 1 Marsh. 74.

(r) Langlois v. Haughton, 2 Law Rec. 116, 2nd Series.

CHAPTER VIII.

REPLEVIN.

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| <p>75. <i>Judgement as in Case of a Nonsuit cannot be entered in Replevin.</i></p> <p>76. <i>Competency of Witnesses in Replevin Suits.</i></p> <p>77. <i>Judgement for Avowant under Irish Statute 33 Hen. VIII. Sess. I. c. 7.</i></p> <p>78. <i>Irish Stat. 7 Will. III. c. 22.</i></p> <p>79. <i>Defendant in Replevin may proceed at common Law, or under this Act.</i></p> <p>80. <i>Procedure under the 7 Will. III. c. 22, upon Judgement for Defendant.</i></p> <p>81. <i>In Case Plaintiff succeeds in the Suit.</i></p> <p>82. <i>New Trial only granted on clear Grounds.</i></p> <p>83. <i>Return of Distress after finding for Defendant on Plea of Property.</i></p> | <p>84. <i>Writ of second Deliverance.</i></p> <p>85. <i>Does not supersede Writ of Id. under the Statute.</i></p> <p>86. <i>Costs of Parties in Replevin</i></p> <p>87. <i>Costs where some Issues are for unsuccessful Party.</i></p> <p>88. <i>Costs in Action for irregular tress.</i></p> |
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REPLEVIN BY CIVIL BILL.

89. *Relation of Landlord and Tenant must subsist.*
90. *Rent demanded must not exceed Fifty Pounds.*
91. *Particular of Demand in Writ must be delivered.*
92. *Procedure on Civil Bill Replevin.*
93. *Hearing and requisite Evidence.*
94. *Replevin Bond.*
95. *Civil-bill for improper Distress.*

75. ISSUE being joined in replevin, either party may serve notice of trial, and the defendant being an actor competent to prosecute the cause, is not entitled to judgement as in case of a non-suit(a) : the plaintiff for neglecting(b) to proceed to trial.

76. A person, under whom cognizance is made, though merely a trustee of the legal(c) estate, is not a competent witness for the defendant, but where distinct cognizances are made for the same estate under several parties(d) not appearing to be connected in interest, if one of the cognizances be abandoned on the trial, the party, in whose name it is made, is a competent witness in support of the other cognizance : however, in replevin by an under-tenant against his landlord, who avowed in his own name, and made cognizance as if of an intermediate tenant, it was ruled(e), that such intermediate tenant was incompetent to prove the amount of the under-tenant's debt. Where a defendant in replevin avowed(f) for rent due from the

(a) *Shortridge v. Hiern*, 5 T. R. 400.

(b) 28 Geo. III. c. 3, s. 2, Irish ; 14 Geo. II. c. 17, English.

(c) *Golding v. Nias*, 5 Espin. N. P. C. 272.

(d) *King v. Baker*, 2 Ad. & Ell. 333 ; 4 Nev. & M. 228 ; *Hart v. Horn*, 2

Campb. N. P. C. 92.

(e) *Upton v. Curtis*, 8 Moore Bing. 210 ; and see the 6 & 7 Geo. IV. c. 14, s. 1, English and Irish.

(f) *Bunter v. Warre*, 1 B. & C. 689 ; 3 D. & Ry. 106 ; *Hartshorn v. Watson*, 5 Bing. N. C. 477.

tiff and James Bunter, and the plaintiff denied the tenancy: James Bunter, though in possession of the premises, together with the plaintiff, yet not appearing to be jointly liable for the rent, was held a competent witness for the plaintiff to shew the terms of the demise.

77. The Irish Statute(*g*), 33 Hen. VIII. sess. 1, c. 7, s. 2, enacts, that every person making avowry, justification, or cognizance in any replevin, or second deliverance for rent, customs, services, or for damage-*feasant*, or other rent, upon any distress in any lands or tenements, if the same avowry, justification, or cognizance, be found for him, or the plaintiff in the same, be non-suited, or otherwise barred, shall recover his damages and costs against the plaintiff, as the plaintiff should have done if he recovered therein.

Pursuant to the preceding Act, in all cases of distress when judgement was given for the avowant on demurrer, a return of the cattle or goods distrained(*h*) was awarded to him, and if the distress had been taken either for rent, services, or for damage-*feasant*, an inquiry of damages and costs was also awarded: the avowant accordingly sued out upon the judgement a *retorno habendo*, and an inquiry of damages either in the same or in separate writs: and upon the return of such writs by the sheriff, final judgement was entered up, that the defendant in replevin should recover, as well the damages and costs assessed by the jury, as the costs adjudged by the Court, and the defendant was enabled to enforce payment by execution against the person or the goods of his adversary: in like manner, upon a verdict for the defendant, the damages were assessed by the jury empannelled to try the cause, and final judgement was entered upon their finding for the amount.

78. By the Irish Statute, 7 Will. III. c. 22(*i*), after reciting that the ordinary remedy for arrearages of rents is by distress upon the lands chargeable therewith, it is enacted, that whenever any plaintiff in replevin shall be non-suit(*j*), before issue joined, in any suit in replevin by plaint, or writ lawfully returned, removed, or depending in any court of record in this kingdom, that the defendant avowant making a suggestion in nature of an avowry, or conuzance for such rent, to ascertain the court of the cause of distress, the court, upon his prayer, shall award a writ to the sheriff of the county where the distress was

(*g*) 33 Hen. VIII. Sess. 1, c. 7, s. 2, Irish; 33 Hen. VIII. Sess. 1, c. 13, s. 2, Irish; 21 Hen. VIII. c. 19, s. 3, English; 7 Hen. VIII. c. 4, s. 3, Eng.

(*h*) Mounson v. Redshaw, 1 Saund. 195, note 3.

(*i*) 7 Will. III. c. 22, Irish; 17 Car.

II. c. 7, English.

(*j*) Note.—The word “nonsuit,” as used in the early Statutes, extends to “*nonpros*,” as it means any relinquishment of the suit; Davies v. James, 1 T. R. 372, *arguendo*; Mounson v. Redshaw, 1 Saund. 195, C. note F.

taken, to inquire by the oaths of twelve good and lawful men of bailiwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained : and thereupon notice of fifteen days shall be given to the plaintiff, or his attorney in case of the sitting of such inquiry ; and thereupon the sheriff shall inquire the truth of the matter contained in such writ, by the oaths of twelve good and lawful men of his county, and upon the return of such inquisition, the defendant shall have judgement to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto the value : and in case they shall not amount to that value, then so much as the value of the goods and cattle so distrained shall amount unto, together with his full costs of suit, and shall have execution thereupon by *feri facias* or *elegit*, or otherwise as law shall require : and in case such plaintiff shall be non-suit after cognizance, or avowry made and issue joined, or if the verdict shall be given against such plaintiff, then the jurors that are empannelled shall be returned to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods or cattle distrained : and thereupon the avowant, or he that makes cognizance shall have judgement for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with full costs, and shall have execution for the same by *feri facias* or *elegit*, or otherwise as the law shall require. If judgement in any of the said Cases may be given^(k) upon demurrer for the avowant, or him that makes cognizance for any rent, the Court shall, at the prayer of the defendant, award a writ to inquire of the *value of such distress*, and upon the return thereof judgement shall be given for the avowant or him that makes cognizance, for the arrears alleged to be behind in such avowry or cognizance, if the goods or cattle so distrained shall amount to that value : and in case they shall not amount to that value, then for so much as the goods or cattle so distrained amount unto, together with his full costs of suit, and shall have like execution as aforesaid ; and in all cases^(l) where the value of the cattle distrained shall not be sufficient to be to the value of the arrears distrained for, that the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain again for the residue of the arrears.

79. This Statute only applies to distresses for rents^(m) or for charges, and does not extend to distresses for tolls, or for trespass

(k) Section 2.

(l) Section 3.

(m) *Baker v. Lade*, Carth. 253.

mage-feasant. The defendant in replevin, at his election, may either enter up judgement for a return of the goods at common law, or he may proceed under the Statute, and the sureties in the replevin bond will not be discharged(*n*) though the avowant pursue the statutable remedy, and obtain judgement for recovery of the amount of the rent ascertained to be in arrear, together with a specific sum for his costs and charges. If, through mistake or otherwise, the defendant in replevin is prevented from entering up his judgement(*o*) under the Statute, he may take his judgement at common law: in an avowry for rent the jury inquired of the value of the cattle, but did not ascertain the amount of the rent in arrear, and though the Court held that the omission could not be supplied by writ of inquiry, because the Act directed that the jurors empannelled to try the issue should inquire concerning the sum in arrear as well as the value of the distress, yet it was(*p*) decided, that the party might have his judgement according to the common law; and in like manner, a jury having, by their verdict, found damages to the amount of the rent claimed by the avowry, but having omitted to ascertain either the rent in arrear or the value of the distress, though the judgement was erroneous under the Statute, yet the avowant(*q*) was permitted to amend by entering a judgement at common law. Where the avowant, upon demurrer, entered judgement for a return, and also under the Statute, after error brought(*r*), it was held that the judgement was right, because the Statute only gives a further remedy, and does not alter the judgement at common law.

80. The avowant or defendant in replevin is entitled to the benefit of this Statute(*s*), first, where he obtains a verdict, or where the plaintiff is nonsuited on the trial of the issue; secondly, where judgement of *nonpros* is entered; and thirdly, where the defendant gets judgement on demurrer. First, in case of a nonsuit at the trial, or a verdict for the avowant, the jury empannelled to try the issue should find the amount of the rent in arrear, and also the value of the goods distrained, and the avowant or defendant will be entitled to judgement for such arrear if less than the value of the distress: and where the avowant carries down the record for trial, and the plaintiff in replevin neglects

(*n*) *Turnor v. Turner*, 2 Brod. & B. 107; 4 Moore, 606; and see *Cooper v. Sherbrooke*, 2 Wils. 117.

(*o*) *Mounson v. Redshaw*, 2 Saund. 195, B. note 3.

(*p*) *Sheape v. Culpeper*, 1 Lev. 255; 1 Siderf. 380; *Herbert v. Waters*, 1 Salk. 205; 1 Ld. Raym. 59; *Dewell v.*

Marshall, 3 Wils. 442.

(*q*) *Rees v. Morgan*, 3 T. R. 349; *Gannon v. Jones*, 4 T. R. 509.

(*r*) *Baker v. Lade*, Carth. 253; *Cooper v. Sherbrooke*, 2 Wils. 116.

(*s*) 7 Will. III. c. 22, Irish; 17 Car. II. c. 7, English.

appearing, a jury(*t*) should be sworn, and a nonsuit entered, and the value of the distress and amount of the rent in arrear at the time of distraining should then be ascertained. The verdict should apply to all the issues in fact joined on the record, unless the finding on one of them should render any finding on the others immaterial(*u*), in which case the jury may be discharged from finding on such immaterial issues.

Secondly, if the plaintiff in replevin be *nonprossed*, or relinquish his suit before avowry, or cognizance, it is necessary for the defendant, either in proceeding(*v*) at common law for recovery of damages given by the Irish Statute(*w*), 33 Hen. VIII., or in proceeding under the Statute(*x*), 7 Will. III. c. 22, to make a suggestion in nature of an avowry or cognizance for the rent in arrear, but if the plaintiff be *nonprossed* for want(*y*) of a plea in bar to the avowry, a suggestion is not required, as the cause of distraining sufficiently appears by the pleading. In proceeding under the Statute, 7 Will. III. c. 22, after judgement of *nonpros*, a writ of inquiry(*z*) must be awarded, commanding the sheriff to inquire touching the sum due for rent, and the value of the distress, and the defendant in replevin will be entitled to final judgement for the arrear of rent ascertained by the sheriff's return to the inquisition, if the distress be of that value, and for the value of the distress, if less than the rent in arrear.

Thirdly, after judgment on demurrer for the avowant, the Statute only directs a writ to inquire of the value of the distress, and upon its return by the sheriff, judgement will be given for the *arrears alleged to be due in the avowry*, if the distress amount to that value, and if not, for the value of the distress: the demurrer admits the arrear of rent avowed for, but does not admit the value of the distress, and therefore the writ of inquiry only directs the value of the distress to be ascertained.

81. Upon a verdict for the plaintiff in replevin, the jury are to ascertain the damages which he has sustained by the taking and detention of the goods, and such damages, according to the practice(*a*) in

(*t*) Hicks v. Young, Barnes, 458; Gardener v. Davis, 1 Wils. 300; Dennis v. Dennis, 2 Saund. 336, B. note 5; Henzell v. Snagg, 4 Law Rec. 264, 1st Series.

(*u*) Cossey v. Diggon, 2 B. & Ald. 546; Powell v. Sonnet, 1 Bligh's Parl. Ca. 545, New. Ser.

(*v*) Mounson v. Redshaw, 1 Saund. 195, C. note 3; Wilkinson's Replevin, 68; but see 3 Dver. 280, B. pl. 14;

Gilb. Replev. 214.

(*w*) 33 Hen. VIII. Sess. 1, c. 7, Irish; 21 Hen. VIII. c. 19, English.

(*x*) 7 Will. III. c. 22, Irish; 17 C. II. c. 7, English.

(*y*) Poole v. Longueville, 2 Saund. 286, note 5.

(*z*) Poole v. Longueville, 2 Saund. 286, note 5; and see Wright v. Lewis, Dowl. Pr. Ca. 183.

(*a*) Wilkinson's Replev. 85; Peirse

England, are fixed at four guineas, being the estimated cost of the replevin bond: if damages be given for an unlawful taking, or (b) vexatious mode of proceeding, the inquisition will be set aside, as compensation for such injuries should be sought in an action of trespass, and not in replevin: after judgement for the plaintiff in replevin, either on demurrer or by default, a writ of inquiry is awarded, under which damages (c) will be assessed, in like manner, for the taking and detention of the distress.

82. After verdict in replevin against the party distraining, a new trial will not be granted, unless upon very clear grounds (d), as the landlord has other remedies for recovery of his rent, and the sureties, by the result of a second trial, might be rendered subject to liabilities from which they were exempt by the verdict.

83. In all cases where a party obtains judgement on his avowry, he is entitled (e) to a return of the distress, because it appears he had good cause for distraining, and if the defendant in replevin succeed on a plea of property either in himself or in a stranger (f), he shall have judgement for a return without making any avowry, because it is evident the plaintiff had no right to complain of the caption, as he had no property in the goods: but on a plea of property in the plaintiff and in another person, the defendant is not entitled to a return, as it is admitted that the goods distrained belong to the plaintiff, though he adopted an erroneous course to establish his right; and so on a plea of *cepit in alio loco*, the defendant is not entitled to a return, unless, by a suggestion in nature of an avowry, he shew a right to retain the distress.

84. The judgement for the avowant or person making cognizance after verdict (g), upon demurrer, or by confession (h) is, that he shall have a return of the cattle or goods irreplevisable, for by the common law, though the defendant was entitled to a return of the goods after judgement of *nonpros* or nonsuit, yet the judgement was not that the return should be irreplevisable, because so long as the legality of the caption was not determined on an investigation of the merits, or by confession of the party, the plaintiff was allowed to issue as many suc-

harr, 2 Mann. & Ry. 419, note; Hawkins v. Warre, 3 B. & Cress. 693; 5 D. Ry. 412, S. C.; Bowen v. Hornidge, Armst. M. & O. 318; in this case £4 10s. were allowed.

(b) French v. Taaffe, 3 Law Rec. 26, 2nd Series.

(c) Wilkinson's Replev. 43 and 85.

(d) Parry v. Duncan, 7 Bing. 245; 5 Moore & P. 19.

(e) Gilb. Replev. 212.

(f) Parker v. Mellor, 1 Ld. Raym. 217; 12 Mod. 122; Presgrave v. Saunders, 2 Ld. Raym. 984; 1 Salk. 5.

(g) Mounson v. Redshaw, 1 Saund. 195, C. note 3; Gilb. Replev. 216; 2 Instit. 341.

(h) Lilly's Pract. Reg. 457; but see Anon. Skinn. 594.

cessive replevins as he thought fit. In order to remedy this inconvenience, it was enacted by the Statute⁽ⁱ⁾ of Westminster the Second that if the plaintiff made default in the superior courts^(j), he should not be entitled to a new replevin for the same distress, but was obliged to have recourse to a writ of second deliverance, which was declared to be final: the writ of second deliverance^(k) is a judicial writ founded on the record of the replevin, in which the *nonpros*^(l) or nonsuit was obtained and issuing out of the Court in which such judgement was given, and lies whether the party was nonsuited either before, or after evidence^(m) on the trial: the procedure under this writ is precisely the same as an original replevin suit, and if the plaintiff in this supplementary suit be defeated in any manner⁽ⁿ⁾, the judgement against him will be irreplevisable.

85. The writ of second deliverance is a *supersedeas* in law to the sheriff to forbear executing the writ of *retorn habend* in the original suit, but it does not supersede^(o) an inquiry of damages under the Statute^(p) 33 Hen. VIII. nor an inquiry^(q) and execution under the Statute^(r) 7 Will. III. c. 22: it has been laid down that the latter Statute has *in effect* taken away the writ of second deliverance^(s) where the distress is made for rent, as such writ could be of no use to the plaintiff in replevin, when his adversary may still proceed to judgement and execution, either for the whole rent, or at least for the value of the distress. The Irish Court of King's Bench held that a writ of *retorn habend* was the groundwork^(t) of the writ of second deliverance, and that there could be no deliverance unless a writ of *retorn habend* had previously issued, and as the defendant in replevin might file his suggestion, and proceed by inquiry under the Statute, without suing out any *retorn habend*, the writ of second deliverance by such means was^(u) in effect taken away.

86. A plaintiff in replevin was entitled at common law to recover

(i) 13 Edw. I. c. 2, Westminster the Second.

(j) 2 Instit. 340.

(k) Mounson v. Redshaw, 2 Saund. 195, D.

(l) Lilly's Pract. Reg. 559.

(m) 2 Lilly's Pract. Reg. 457.

(n) 2 Instit. 341.

(o) Anon. Latch. 72; Palm. 403; Pratt v. Rutledge, 1 Salk. 95; 12 Mod. 546.

(p) 33 Hen. VIII. Sess. I. c. 7, Irish; 21 Hen. VIII. c. 19, English.

(q) Mounson v. Redshaw, 1 Saund.

195, E. note 3; Cooper v. Sherbrook 2 Wils. 116.

(r) 7 Will. III. c. 22, Irish; 17 Car. II. c. 7, English.

(s) Mounson v. Redshaw, 1 Saund. 195, E. note 3; Playters v. Sheering, Ventr. 64; 3 Blackst. Comm. 150; Gil Repl. by Hunt, 218; and see Introduction to Vidian's Entries.

(t) Morris v. M'Mullen, 1 Huds. Br. 278.

(u) But see Perreau v. Bevan, 5 1 & Cress. 284-304; Arnold v. Bingham 1 Dyer, 41, B. pl. 4.

s, and(v) by the Statute of Gloucester, a party who had a right
ges was declared entitled to recover his costs : at common law,
lant in replevin, or avowant, was not entitled(w) to damages,
ugh, in most cases, considered the promovent in the suit, he
d not to come within the provisions of the Statute of Glouces-
by the Irish Statutes(x), 33 Hen. VIII. cc. 7, 13, costs are
every avowant, or bailiff making cognizance in replevin for
t or services, or for damage-*feasant*, if such avowry or cogni-
e found for him, or if the plaintiff in replevin be *nonprossed* or
e barred : so an executor avowing for rent under the Irish Sta-
10 Car. I. sess. 2, c. 5, if successful, is(z) entitled to costs. By
h Statute(a), 10 & 11 Car. I. c. 8, it is enacted, that if any per-
l commence any action in any court, wherein the plaintiff or de-
might have costs, in case judgement should be given for him,
plaintiff, after appearance, be nonsuited (*nonprossed*), or a ver-
s against him, then the defendant shall have his costs : this Sta-
not confined to suits commenced in the superior courts, and a
nt who removed the proceedings by *recordari* from the county
to the King's Bench, having signed judgement of *nonpros*, it
ed(b), that under this Act he was entitled to his costs. The
atute(c), 7 Will. III. c. 22, s. 1, allows full costs to a defen-
ailing himself of its provisions, and on a general avowry under
h Statute(d), 25 Geo. II. c. 13, if the plaintiff were nonsuited,
nued, or had judgement against him, the defendant in replevin
itled to double costs of suit,

ible costs were only allowed in cases of nonsuit, discontinuance,
ement, and where parties agreed by bond, before issue joined,
ut the matters(e) in dispute to arbitration, and that the costs
abide the event of the reference, the arbitrator having made his
n favour of the defendant in replevin, it was ruled he was not
to double costs. However, by the Imperial Statute(f) 5 & 6
97, it is enacted, that so much of any clause, enactment or pro-

Edw. I. c. 1, Statute of Glou-

mes v. Tintney, W. Jones, 434;
v. Parsons, 2 Ro. Rep. 37.

Hen. VIII. Sess. 1, c. 7, Ir.;
VIII. c. 13, Irish; 21 Hen.
19, English; 7 Hen. VIII. c. 4,

10 Car. I. Sess. 2, c. 5, Irish; 32
II. c. 37, English.

arnell v. Keightley, 2 Ro. Rep.
lb. Repl. 209.

(a) 10 & 11 Car. I. c. 8, Irish; 4
Jac. I. c. 3, English.

(b) Davies v. James, 1 T. Rep. 371.

(c) 7 Will. III. c. 22, s. 1, Irish; 17
Car. II. c. 7, English.

(d) 25 Geo. II. c. 13, s. 4, Irish; 11
Geo. II. c. 19, s. 22, English.

(e) Gurney v. Buller, 1 B. & Ald.
670.

(f) 5 & 6 Vict. c. 97, s. 2, English &
Irish.

vision in any public Act, whereby it is provided that either double treble costs, or any other than the usual costs between party and party shall or may be recovered, shall be, and the same are thereby repealed, provided, that instead of such costs, the party or parties entitled to such double or other costs, shall receive such full and reasonable indemnity as to all costs, charges and expenses incurred in any action or other legal proceeding, as shall be taxed by the proper officer in the behalf, subject to be reviewed in like manner, and by the same authority as any other taxation of costs by such officer.

87. The Irish Statute(*g*), 6 Anne, c. 10, which enables the defendant in any action, or the plaintiff in replevin, by leave of the Court to plead several matters, enacts, that if any such matter, upon demurrer joined, be judged insufficient, costs shall be given *at the discretion* of the Court, or if a verdict shall be found upon any issue in such cause for the plaintiff, costs shall also be given in like manner, unless the judge who tried the issue shall certify that the defendant or such plaintiff in replevin had probable cause to plead such matter, which upon such issue shall be found against him.

Where several issues are joined in replevin, some of which are found for the defendant, and others for the plaintiff, and the latter is entitled to judgement, if the judge who tried the cause(*h*) certify that the plaintiff in replevin had probable cause for pleading the matters found against him, the costs of such issues found for the defendant are not to be deducted from the costs of the successful party, but if no certificate be granted, those costs will be deducted. It is unusual, however, to grant(*i*) any such certificate in favour of a party pleading double, where the issues on those pleadings are found against him, as it is only reasonable that the party should pay the costs who caused the expense where several cognizances stated in different modes the result of a complicated will, it being uncertain who had the right to distrain, and the party distraining having got judgement, the Court refused to allow(*j*) to the unsuccessful party the costs of the cognizances found in her(*k*) favour, as the judge who tried the cause thought it was a proper case for granting his certificate : but the plaintiff in replevin was held entitled to the costs incurred by reason of the unnecessary plea of *non cepit*.

The fortieth general rule of the Irish Courts orders, that no costs

(*g*) 6 Anne, c. 10, ss. 4 and 5, Irish ; 4 Anne, c. 16, English.

(*h*) *Dodd v. Joddrell*, 2 T. R. 237 ; *Cook v. Green*, 5 Taunt. 594 ; 1 Marsh. 234, S. C.

(*i*) *Duberley v. Page*, 2 T. R. 394.

(*j*) *Denny v. Hewson*, 2 Fox & S. 47.

(*k*) See Yeo's General Rules, 15 ; see the Seventh English General Rule 4 Will. IV.

allowed on taxation to a plaintiff upon any counts or issues, which he has not succeeded, and the costs of all issues found for defendant shall be deducted from the plaintiff's costs: a successful plaintiff not liable under this rule to pay the costs of issues on which he failed, where the case is substantially single, further than such costs were necessarily incurred by the additional pleadings, and it is decided(*m*) that the judge is not by this rule deprived of the power of certifying under the Statute of Anne.

By the Irish Statute(*n*), 15 Geo. II. c. 8, it is enacted, that in actions of trespass, or on the case, against any person entitled to services of any kind, his bailiff or receiver, or any other person claiming by virtue of this Act or otherwise, upon the defendant being chargeable with such rents or services, or to any distress or sale or disposal of any goods or chattels thereupon, *it shall be lawful* for the defendant in such actions to plead the general issue, and to give special matter in evidence; and in case the plaintiff in such action shall become nonsuit, discontinue, or have judgement against the defendant shall recover double costs of suit. In an action of trespass brought by a third person against a landlord for seizing a distress, which had been taken on demised premises as a distress for rent, the landlord, who obtained a verdict, was held entitled to double costs, as ruled, that neither the certificate of the judge who tried the case nor any suggestion on the record was requisite. So a landlord who was sued in trespass(*p*) for an irregular distress, and obtained a verdict, was held entitled to double costs under this Statute, although he pleaded specially as to matters which, under the Statute, have been used as a defence on the general issue. By the late Statute(*q*), 5 & 6 Vict. c. 97, the successful party can only recover costs.

The expenses attending replevin suits in the superior courts were oppressive both to landlord and tenant, that it was deemed expedient by the legislature to provide a summary remedy by civil bill, and enactments of replevin relating(*r*) to distresses for rent between landlord and tenant, where the rent for, or in respect of which any distress was levied or ought to have been made, shall not exceed fifty pounds in value or value.

Finlay v. Bourne, 5 Law Rec. 25.
Finlay v. Messenger, 8 Ad. & El. 3 Nev. & P. 593.
 15 Geo. II. c. 8, s. 10, Irish, per-
 by the 1 Geo. III. c. 17, s. 12,
 15 Geo. II. c. 19, s. 21, English.

(*o*) *Finlay v. Seaton*, 1 Taunt. 210.
 (*p*) *Gambrell v. Ld. Falmouth*, 5 Ad. & El. 403.
 (*q*) 5 & 6 Vict. c. 97, English and
 Irish.
 (*r*) 6 & 7 Will. IV. c. 75, s. 5, Irish.

The replevin by civil bill is confined to distresses for rent made by a party in the character of landlord, but it is not requisite that the relation of landlord and tenant shall(*s*) subsist between the actual parties to the suit, for if such relation subsist between the defendant in replevin and a third person in respect of the premises, and the goods are taken in the lawful exercise of that right, a case is established within the meaning of the Act. The bringing a civil bill estops the plaintiff for all purposes of jurisdiction, from denying(*t*) tenancy, but if it appear on the hearing that the party distraining has no interest in the premises as landlord, the suit must be dismissed. All tenancies are included in this Statute, whether(*u*) created by parol, by executory agreement, or accepted proposal for a lease, or by implication arising from payment of rent.

90. According to the construction originally given to this Act, the jurisdiction conferred on the inferior court was made(*v*) to depend on the sum due for rent at the time of distraining, but the Irish judges, upon a writ of error, unanimously decided that a civil bill replevin(*w*) could only be maintained where the yearly rent, in respect of which a distress was made, did not exceed £50 in amount or value. The assistant-barrister is authorized to entertain the suit where the yearly reserved rent does not exceed £50 in money, or where it consists wholly or partially in labour, duties, or services, the value of which, including any pecuniary rent, ought not to have been estimated at any greater sum than £50: under a lease, reserving a yearly rent of £40, payable half-yearly, and the delivery of one hundred loads of turf yearly, if a distress be made, and a particular served, claiming one year's money-rent, together with the stipulated quantity of turf, the value must be estimated by the court, not only for the purpose of ascertaining the sum really due, but whether the suit was properly instituted.

91. The sixth section enacts, that in all cases of distresses for rent, the person making any such distress shall deliver to the person in possession of the premises, for the rent of which such distress shall be made, or in case there shall not be any person found in possession, shall affix on some conspicuous part of the premises, a particular in writing of the rent demanded, specifying the amount thereof, the time or times

(*s*) *Armitage v. Donohue*, Irish Circ. Rep. 236.

(*t*) *Orr v. Raverty*, 1 Cr. & D. Circ. Ca. 254; *Fox v. Rabbett*, 1 Cr. & D. C. C. 28.

(*u*) *Chartres v. Gilroy*, *Jebb's Reserved Cases*, 319.

(*v*) *Daly v. Ld. Bloomfield*, 5 Irish Law Rep. 79; *Feeney v. M'Alden*, 3 Cr. & D. C. C. 200.

(*w*) *Daniel v. Bingham*, 4 Irish Law Rep. 285, affirmed on error in the Exchequer Chamber.

when the same accrued, and the person or persons by whom, or by whose authority, the distress is made. It is the duty of a bailiff or broker, at the time of distraining, to deliver to the occupier of demised premises, or in case of their being unoccupied, to post a particular, or statement in writing of the rent demanded, specifying the yearly rent payable out of the premises, and the amount for which the caption is made, the time or times when each portion(*x*) or gale of rent claimed, accrued due, and by whom, or by whose authority, the distress is made: if the occupier keep out of the way in order to avoid being served with the particular, service effected on him as soon as he can be discovered, is considered sufficient. The particular should state the name(*y*) or names of the landlord, or persons who caused the distress to be made, and where goods are distrained for rent by the agent of a non-resident landlord, the particular should state that the seizure is made by the principal, though resident abroad, and not by the agent, for the purpose of obviating any objection which might be raised to the competency of the agent, as a witness, if it appeared he was a party to the distress: it is incumbent, however, on the party replevying, to make all those who are named(*z*) in the particular as the persons by whom, or by whose authority, the distress was made, defendants to his civil bill. An inventory of the cattle, or other property meant to be impounded on the premises, or elsewhere, should be made out by the bailiff, and though not absolutely necessary, it is prudent that the tenant or occupier should be furnished with a copy, in order to apprise him what goods he may be obliged to replevy, and to prevent disputes respecting the extent of the distress. The particular(*a*) of the rent must be delivered to the occupier, or posted, in case the premises are unoccupied, either at the time of commencing the distress, or as speedily as circumstances will permit.

The particular of the rent claimed was styled by Bushe, C. J., "an anticipated avowry," and seems to constitute the foundation of the civil bill jurisdiction in replevin, and is in this respect obligatory(*b*), and not merely directory. It has been a subject of much doubt whether the provision of the Act, requiring a particular to be furnished, extends to all replevin suits, but it is now(*c*) settled that this section

(*x*) *Davis v. Jackson*, Irish C. Rep. 384.

D. C. C. 468.

(*y*) *Walters v. M'Nally*, 3 Cr. & D. C. C. 207.

(*b*) *Murphy v. Butler*, Jebb's Res. Ca. 320.

(*z*) *Orr v. Stevenson*, Irish C. Rep. 257, 2 Cr. & D. C. C. 228.

(*c*) *Daniel v. Bingham*, 4 Irish Law Rep. 285, and affirmed on a writ of error in the Exchequer Chamber.

(*a*) *Browne v. Motherwell*, 1 Cr. &

does not apply to replevin suits in the superior courts, and that non-service of a particular affords no ground of defence to an avowry for rent. Even if the Statute were to be deemed to extend to the superior courts, and to be mandatory in all cases, and although the landlord should not comply with its terms by delivering, or posting a particular, he would not become(*d*) a trespasser by reason of such omission, and would only be liable to an action on the case for any injury sustained by the tenant. If a particular be delivered stating the reservation of a yearly rent exceeding £50, the assistant-barrister has no(*e*) authority to entertain the suit, or to inquire whether the yearly rent claimed exceeds the yearly rent payable out of the demised premises: and if a particular be not delivered, the foundation of the civil bill replevin altogether fails, and the inferior tribunal has no authority to afford the tenant any relief. The civil bill replevin appears to have been given as much for the benefit of the landlord as of the tenant; and as the landlord, by not serving a particular of the rent, may compel the tenant to resort to a superior court for redress, in like manner where a particular is delivered, the tenant may, at his option, proceed by replevin returnable in a superior court, and may decline the jurisdiction of the inferior tribunal. A landlord who claims by his particular a year's rent, where only half a year's rent is due, is entitled to recover so much of his demand as shall be established by proof, though if the distress were excessive, he might be made answerable in damages for the injury.

92. Where a particular is delivered or posted, and it appears that the yearly rent payable out of the premises does not exceed £50, the party whose goods have been distrained is entitled to lodge(*f*) with the clerk of the peace for the county, a civil bill, stating the particulars of the property distrained, the place(*g*) where the distress was made, and the person or persons on whose behalf(*h*) it was made, and requiring such persons to appear and answer the civil bill at the next general or quarter sessions of the peace for the district or division in which the distress was made, and thereupon the clerk of the peace is bound to issue an order requiring the sheriff of the county to replevy the goods so distrained; and the sheriff to whom any such order is directed, or his replevinger, is required to take a bond from the person obtaining

(*d*) *Daly v. Ld. Bloomfield*, 5 Irish Law Rep. 79; *Fox v. Lynch*, 1 Cr. & D. C. C. 227; *Wootley v. Gregory*, 2 Yo. & Jerv. 536.

(*e*) But see *Blake v. Prendergast*, Ir. C. Rep. 479.

(*f*) Sects. 8, 9.

(*g*) *Traynor v. Vesey*, 2 Cr. & D. C. 250; *M'Donough v. Tennison*, Irish C. Rep. 663; *Gee v. Cashman*, 3 Cr. & D. C. C. 50.

(*h*) *Donohue v. Keeffe*, 3 Cr. & D. C. 91.

order, with two responsible persons as sureties, in double the amount of the value of the property distrained, in the form and to the effect set forth in the first schedule to the Act, or as near thereto as the circumstances of the case will admit, and then to execute the order of replevin, and make a proper return thereto, directed to the court of the assistant-barrister for the county.

The first step towards procuring a civil bill replevin is by an application to the clerk of the peace for an order on the sheriff to replevy goods, and for that purpose a civil bill must be lodged with the clerk of the peace, and as a preliminary condition is imposed that the amount of the yearly rent shall not exceed £50, it seems necessary that the clerk of the peace shall be satisfied of that fact, by requiring the tenant to produce the particular served on him by the landlord. Many difficulties will be obviated by pursuing this course, as where the distress is made for a rent-charge, or for damage *feasant*, or where the yearly rent exceeds £50, the tenant and his sureties will be relieved from the expenses of an unavailing suit; and if no particular is served, the tenant must proceed by replevin in the superior courts. However, if a civil bill replevin be issued, where goods are distrained for recovery of a rent-charge, or in other instances where the court has jurisdiction, or where a distress is made for an arrear due on foot of annual rent exceeding £50, the civil bill must be dismissed, and an order will be made for (i) assignment of the replevin bond, because the plaintiff gets back his goods in consequence of his giving security for the rent, and if it appear that the defendant had any right to distrain, would be unjust to deprive him of the substituted security. A copy of the civil bill must be served upon every person named in it as a defendant; and in case the party on whose behalf the distress is made does not reside within the jurisdiction of the inferior court, service of the civil bill on the person distraining is declared to be good service on the absent party; and such absent party is, for the purposes of this Act, to be deemed within the jurisdiction. The person who authorized the distress, and not the distraining bailiff, must be made the defendant in the civil bill, as the landlord (j), at whose instance the distress is made, is the only person contemplated by the Act as defendant in the replevin.

93. On the hearing of the cause, if it appear that the yearly rent payable out of the premises does not exceed fifty pounds, the assistant-

(i) *Armitage v. Donohue*, Irish C. Rep. 236.

(j) *Donohue v. Keeffe*, 3 Cr. & D. C. C. 91.

barrister is to decide whether(*k*) any, and what arrear of such reserved rent was due at the time of distraining, and if any sum were due for rent when the distress was made, and no tender of the sum so due was made before bringing the civil bill, he is required to make a decree for payment of such sum, and of the costs of defending the suit, and of making the distress: and in case no rent was due at the time of distraining, or that the amount due, with reasonable costs of distress, was(*l*) tendered prior to lodging the civil bill, the assistant-barrister is to direct that the replevin bond shall be given up to the party complaining of the distress, and also to make a decree for payment by the defendant of such damages as the court shall think fit; and if necessary to order that such damages and costs shall be set-off against, or deducted from, any rent then due, or thereafter to become due, by the party complaining, and to decree accordingly.

The plaintiff in replevin, after proving service of the civil bill in due time, is bound, if the caption and particular be disavowed, to shew that the distress was made(*m*) by the defendant or by his authority, at the place mentioned in the civil bill; but after requiring such proof, the defendant will not be suffered to justify the seizure of the goods as a distress for rent, such defences being considered inconsistent. The landlord or defendant is, in fact, the promovent in the suit, and he is bound to shew for what cause he distrained, whether as a landlord for rent, or whether his demand is of such a nature as to exclude the jurisdiction of the inferior court; and if the yearly rent does not exceed the prescribed limits, then that a sufficient particular was delivered contemporaneously with making the distress: the yearly rent, the gale-days, and the right of the party distraining, must be established in the same manner as is required in the superior courts. On these proofs being made, the landlord is entitled to recover any arrear of rent which shall appear due to him at the time of distraining, and was claimed by his particular, and is not barred by the Statutes of Limitation, although exceeding fifty pounds in amount. The tenant may shew that the whole, or any part of the rent claimed was satisfied, or that a tender was made of the whole rent proved to be due, or claimed by the particular, before the civil bill was lodged.

The plaintiff is also at liberty to shew that the cattle or goods, at the time of their caption, were not liable to the landlord's distress. Great injustice might be done if the plaintiff in the suit were not

(*k*) Sect. 12.

(*l*) The word "no" is erroneously inserted in the Act.

(*m*) *Orr v. Stevenson*, 2 Cr. & D. C. 228; *Sheridan v. Henry*, 1 Cr. & D. C. 23.

lowed to prove that the chattels, or growing crops on the lands were taken in execution by a *bona fide* creditor, previously to their seizure by the defendant: or the plaintiff may prove that the cattle or goods distrained were exempted from the landlord's distress, either in consequence of being in custody of the law, or in actual use, or of being otherwise privileged or protected. The propriety of this construction appears from the 15th section of the Act, which authorizes the assistant-barrister to order and decree that the goods distrained shall be returned to the party who distrained them, and that all such goods, if returned, or recovered under any such decree, may be sold for recovery of the rent due, and expenses, at the expiration of four days after being returned. However, in cases of this description, it is more prudent for the injured party to resort to the superior courts for redress.

94. The replevin bond is to be assigned by the sheriff, or his representative, to such person or persons as the assistant-barrister shall direct, by endorsement on the instrument, and the assignee is at liberty to sue upon it in his own(n) name in the inferior court, within the jurisdiction of which any one of the obligors of the bond shall reside, whatever may be the amount of the penalty, and such proceedings may be taken against all the obligors, or against any one or more of them: and in case the plaintiff in replevin shall not appear(o) at the sessions, and where he prosecutes his suit with success, the assistant-barrister, at the request of any party named as a defendant in the civil bill, may order and decree that the bond shall be assigned to the defendant so applying, and the bond, when assigned, is to stand as a security for the full amount of the value of the goods distrained, and the costs of the proceedings in relation to the distress, and of the proceedings, as well upon the civil bill, as upon the bond. The replevin bond is only(p) assignable by express order of the inferior court, or of the judge of assize on appeal, and it is not requisite that the order for such assignment shall be made(q) at the same sessions in which the decree is pronounced. Where the plaintiff in replevin does not appear at the sessions, or where the civil bill is dismissed for want(r) of jurisdiction, or where a landlord obtains a decree, the party requiring an assignment of the bond must waive(s) any objection to the regularity of the proceedings in replevin, and must shew he had a right to distrain.

(a) Sect. 13.

(o) Sect. 14.

(p) *Houseman v. Anderson*, 1 Cr. & F. C. C. 70.

(q) *Daly v. Hynds*, 1 Cr. & D. C. C. 514.

(r) *Orr v. Lavery*, Jebb's Res. Ca. 282; *Orr v. Raverty*, 1 Cr. & D. C. C. 259; *Armitage v. Donohue*, Irish C. Rep. 236.

(s) *Davis v. Jackson*, Irish C. Rep. 384.

The sheriff is liable to an action by the tenant for refusing a replevin bond, where adequate security is offered; and in rejecting the proposed sureties, the reason of his refusal must be in writing by the sheriff, or his replevinger making the object the sureties in a replevin bond prove insufficient, or if the sheriff take any bond, or take a bond not warranted by the Act, he is answerable in damages for his negligence or misconduct, in the same manner and to the same extent as in the superior courts, but it is a requisite to prove that any replevin bond was executed for the purpose of enabling(*u*) a plaintiff in replevin to support his civil bill. The form of the bond is given in the appendix to the Act, and(*v*) if the bond will be sufficient. An action does not lie in the superior courts against an assignee(*w*) of the bond, grounded on a civil bill in replevin: an action on the bond in an inferior court, proof must be made of due execution, by producing the subscribing witness to the instrument, accounting for his absence; and where the witness appears to be in collusion with the adverse party, and does not attend, after a summons for that purpose, secondary evidence will be received of the handwriting of the absent witness, and of the parties to the instrument. The sheriff's(*y*) endorsement, the decree or order to assign the bond, and the(*z*) amount of the rent due at the time of distraining, must also be proved.

95. If a distress be made for rent when none was due, or if the rent is unascertained, or if the goods of the plaintiff in the distress be otherwise improperly distrained, or if the full amount of all arrears, with reasonable costs of distress, was tendered before the civil bill, the owner of the goods may recover damages in replevin cause for the injury sustained; but it seems requisite that the true nature(*a*) of the complaint intended to be brought forward, be stated in the civil bill. Where the goods distrained are sold for rent in arrear without being replevied, the tenant may recover for an excessive or irregular distress, by civil bill in trespass, according to the circumstances, to any amount within the jurisdiction of the court.

A summary remedy is also given by Statute(*b*) within the

(*t*) Sect. 10.

(*u*) *Browne v. Motherwell*, 1 Cr. & D. C. C. 470.

(*v*) *Fishbourne v. Knaggs*, 1 Cr. & D. C. C. 47.

(*w*) *Bentley v. Hastings*, 6 Irish Law Rep. 170.

(*x*) *Jackson v. Fullerton*, 1 Cr. & D. C. C. 282.

(*y*) *Roughan v. Fetherstone*, Rep. 693.

(*z*) *Russell v. Lane*, Irish Rep. 840.

(*a*) *Gloster v. Arthur*, Irish Rep. 832.

(*b*) 5 & 6 Vict. c. 24, s. 67, & 3 Vict. c. 71, s. 39, English.

istrict, for unlawful, irregular, or excessive distress, on com-
ade to any of the divisional justices by any occupier of a house
ng by the week, or month, or whereof the rent does not
he rate of fifteen pounds yearly, if it shall appear that such dis-
s improperly taken, or unfairly disposed of, or that the charges
re illegal, or that the proceeds of the sale of such distress had
duly accounted for to the owner; and such justice may order the
if not sold, to be returned, on payment of the rent due at such
he shall appoint; or if the distress shall have been sold, then
order payment to the tenant of its value, after deducting the
earing to be due; and in default of compliance with the order,
rainor shall forfeit to the party aggrieved the value of such
not being greater than fifteen pounds.

CHAPTER IX.

ACTIONS OF DEBT AND COVENANT.

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| 1. <i>Nature of the Action of Debt.</i> | <i>Rent falling due after assigning over.</i> |
| 2. <i>Does not lie at common Law for Rent due on a subsisting freehold Lease.</i> | 11. <i>Action of Debt against personal Representatives of Lessee.</i> |
| 3. <i>Extended by Statute to Rent due on freehold Leases.</i> | 12. <i>Debt for double Rent under 15 Geo. II. c. 19.</i> |
| 4. <i>Debt by personal Representatives of Owners of freehold Rents.</i> | 13. <i>— for double Value, under 11 Anne, c. 2.</i> |
| 5. <i>Action of Debt founded on Privity of Contract.</i> | 14. <i>Remedy by Civil Bill for double Value.</i> |
| 6. <i>Does not lie by Assignee of Reversion against Lessee assigning before Rent fell due.</i> | |
| 7. <i>Lessor, after parting with his Reversion, may recover Arrears of Rent previously due.</i> | |
| 8. <i>Debt lies for Rent reserved on Assignment of Lease, though no Reversion retained.</i> | |
| 9. <i>— does not lie against Lessee for Rent due, after Assignment by him with the Lessor's Concurrence.</i> | |
| 10. <i>Assignees of Lease are not liable for</i> | |

PLEADINGS.

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| 15. <i>Venue in Action of Debt.</i> |
| 16. <i>Declaration in Debt for Rent may be general.</i> |
| 17. <i>Manner of pleading Deeds.</i> |
| 18. <i>When necessary to make Profert of Deeds.</i> |
| 19. <i>Profert of Bargain and Sale for a Year need not be made.</i> |
| 20. <i>Deed set out by Defendant on Oyer, deemed part of the Declaration.</i> |

1. THE action of debt is founded on a contract express(a), or implied, in which the certainty of the debt or duty appears, and by this remedy the claimant is to recover his demand *in numero*, and not to be compensated in damages, as in *assumpsit* or covenant. This action lies on any covenant(b) for payment of an ascertained rent, or where the damages can be reduced(c) by averment to a certainty, as upon a covenant to pay so much by the load for a certain(d) quantity of timber, or for payment of a certain(e) proportion of the expenses of a suit, by averring the amount; but there must be a direct duty to pay, and not merely a collateral(f) or conditional covenant by one person for payment of an annuity charged on lands belonging to another, nor can this action be maintained for unliquidated damages.

(a) Bac. Abr. Debt, A.; Bull. N. P. 167; Slade's case, 4 Rep. 92, B.; Ruder v. Price, 1 H. Bla. 550.

(b) Sicklemore v. Symonds, Cro. El. 797.

(c) Birch v. Weaver, 2 Keb. 225; Gilb. Debt, 387; Bull. N. P. 167.

(d) Ingledew v. Cripps, 2 Ld. Raym.

814; 7 Mod. 87; Evans v. Jones, 5 Mees. & W. 295.

(e) Sanders v. Marke, 3 Lev. 429.

(f) Randall v. Rigby, 4 Mees. & W. 130; 6 Dowl. Pr. Ca. 650; Evans v. Jones, 5 Mees. & W. 295; Harrison v. Matthews, 10 Mees. & W. 768; Vin Abr. Debt, D. pl. 3.

ion of debt lay, at common law, for recovery of rent in ar-
a lease of lands or tenements for years, or at will, either
continuance of the demise, or after its determination, and
is reserved payable quarterly, or at other stated periods,
of rent constitutes(*g*) a separate debt, and a separate action
for each gale of the rent: but debt is not maintainable on a
pay a sum certain by instalments at different times, until
of payment(*h*) have elapsed, as it was considered that only
should be brought on any entire contract.

action of debt, however, was not maintainable, at common
t due(*i*) on a subsisting freehold lease, because the policy of
law would not suffer an injury affecting the realty to be re-
a personal action, but on the expiration or other determina-
freehold interest, the lessor was allowed to recover(*j*) the
ar by action of debt, because the demised premises having
e a security for the rent, it was reasonable that the personal
the tenant should be liable to satisfy the arrear.

he Irish Statute(*k*), 9 Anne, c. 8, s. 5, the remedy by action
xtended to the recovery of any arrears of rent due upon a
mise for life or lives, during its continuance, in the same
if such rent were due and reserved upon a lease for years:
ng enactment is only applicable to cases between landlord
and does not enable a party to sue in debt for the arrears of
granted for life(*l*), by deed or will, out of a freehold estate,
annuity continues a freehold interest. Where lands were
Martha Webb for her life, she paying thereout during her
uity of £10 to J. S., it was ruled(*m*) that debt would not lie
of the annuitant against Martha Webb for an arrear of the
.

executors of tenant for life of a rent-service, or rent-
a tenant *pur auter vie* after the death of the *cestuique vie*,
common law, have maintained(*n*) debt for recovery of arrears
t, though not entitled to distrain; but the personal represen-

v. Phillips, 2 Ventr. 129;
ke, 3 Salk. 118; Marckar
Salk. 303, No. 4; Hunt's
42; Hunt *v. Jones*, Cro.

C.
tt. 47, B.; Rudder *v. Price*,
0; Bull. N. P. 168.

of Winchester *v. Wright*,
1056; Gilb. Debt, 372; 1
l, Dett. G.

ulisbury's case, Year Book,
fo. 29; Gilb. Rent, 94.

(*k*) 9 Anne, c. 8, s. 5, Irish; 8 Anne,
c. 14, s. 4, English.

(*l*) Kelly *v. Clubbe*, 3 Br. & B. 130;
6 Moore, 335.

(*m*) Webb *v. Jiggs*, 4 M. & Selw.
113; Randall *v. Rigby*, 4 Mees. & W.
130; 6 Dowl. Pr. Ca. 650; Cavanagh *v.*
Morrisson, 1 Fox & Sm. 75.

(*n*) Duppa *v. Mayo*, 1 Saund. 282,
note 1; Hool *v. Bell*, 1 Ld. Raym. 170;
Ognell's case, 4 Rep. 40, B.; Co. Litt.
162, B.; and Hargr. note 299.

tatives of a person who was seised in fee of a rent-service or rent-charge had no remedy for the arrears which became due in the life-time of the owner. By the Irish Statute(o), 10 Car. I. sess. 2, c. 5, it is enacted, that the executors and administrators of tenants in fee simple, in fee tail, and for term(p) of lives, of rent-services(q), rent-charges, rents-seck, and fee-farms, unto whom any such rent or fee-farm is due and not paid at the time of their death, shall have an action of debt for all such arrears against the tenants who ought to have paid the said rent so being behind in the life-time of their testator, or against the executors and administrators of such tenants: and if any person shall have(r), in right of his wife, any estate in fee-simple, fee tail, or for term of life in any rents, or fee-farms, and the same shall be due and unpaid in the said wife's life, then the husband, after the death of his wife, his executors and administrators, shall have an action for such arrears against his tenant of the demesne, that ought to have paid the same, his executors or administrators: and if any(s) person who shall have any rents, or fee-farms for term of life, or lives of any other person or persons, and such rent shall be due and unpaid in the life of such person or persons, for whose life or lives the estate of the said rent did depend or continue, and after the said person or persons do die, then he unto whom the rent was due, his executors and administrators, shall have an action of debt against the tenant in demesne(t), that ought to have paid the same, when it first was due, his executors and administrators.

5. The action of debt being founded on privity of contract, a lessee for years(u), though he does not enter or occupy, is answerable for the rent which is due by force of the lease or contract, and not by reason of the occupation, and if the lessor convey his estate to a third person, the remedy by action of debt is transferred to the grantee(v) of the reversion for recovery of any rent becoming due after such assignment, because the privity of contract follows the estate in the land.

The assignee of the reversion in the whole or in part(w) of the de-

(o) 10 Car. I. Sess. 2, c. 5, Irish; 32 Hen. VIII. c. 37, English; 3 & 4 Vict. c. 105, ss. 61, 62, Irish; 3 & 4 Will. IV. c. 42, ss. 37, 38, English; and see *ante*, 738.

(p) These words have been restricted in their meaning to the personal representatives of tenants *pur auter vie*, so long as *cestuique vie* lives; *Duppa v. Mayo*, 1 Saund. 282, note 1.

(q) *Cupit v. Jackson*, M'Clell. 504.

(r) Section 2.

(s) This third section seems only de-

claratory of the common law on the subject.

(t) This expression means the person who took the profits when the rent became due.

(u) *Bellasis v. Burbrick*, 1 Salk. 209; 1 Ld. Raym. 170; *Gilb. Debt*, 376.

(v) *Walker's case*, 3 Rep. 22, B.; *Thursby v. Plant*, 1 Saund. 241, D. note 6.

(w) *Ardes v. Watkins*, Cro. Eliz. 651; *Twynam v. Pickard*, 2 B. & Ald. 105.

demised premises, or the assignee of a part of the reversion(*x*) may, by action of debt, recover any rent or portion of rent falling due to him after such assignment, and the heir or devisee of the lessor may in like manner enforce payment of any rent becoming due after the lessor's death: an assignee of the reversion may support debt for rent against the lessee, without giving him any previous notice(*y*) of the assignment; but payment of the rent to the lessor before notice(*z*) of such assignment discharges the lessee from liability.

6. A grantee of the reversion cannot maintain debt against the original lessee for rent falling due after assignment made by the lessee of all his estate in the demised premises: one Thomas Plain having demised to the defendant Oliver, reserving rent, afterwards granted his reversion to the plaintiff, and before any rent accrued due, and after(*a*) such grant of the reversion, the lessee assigned his term in the premises to one Southmead: in an action of debt by the grantee of the reversion against the original lessee, for rent which became due after the assignment of the lessee's interest, it was decided that such action did not lie, because the privity of estate was destroyed by the assignment to Southmead before the rent became in arrear, and that such rent could only be recovered from Southmead, who had the whole estate in the lease when the rent fell due: however, under similar circumstances(*b*), an action for breach of an express covenant in non-payment of rent would lie against the original lessee, by force of the Statute(*c*) 10 Car. I. Sess. 2, c. 4, which transfers the privity of contract to the assignee of the reversion. A grantee of the reversion may bring debt against the original lessee for the whole(*d*) rent reserved by the lease, although the lessee had assigned part of the demised premises before any rent was in arrear, because the entire estate in part of the land was retained by him.

7. A lessor, after parting with(*e*) his reversion in demised premises, may recover, in an action of debt, arrears of rent which accrued before prior to such conveyance, and although demised premises be recovered by title paramount, debt lies by the lessor(*f*) for arrears of rent

(*x*) Co. Litt. 215, A.; *Attoe v. Hemmings*, 2 Bulstr. 281.

(*y*) *Birch v. Wright*, 1 T. R. 385.

(*z*) 6 Anne, c. 10, s. 10, Irish; 4 Anne, c. 16, s. 10, English.

(*a*) *Humble v. Oliver*, Poph. 55; 1 Bro. 56; *Humble v. Glover*, Cro. Eliz. 328; *Gouldsb.* 182, S. C.

(*b*) *Thursby v. Plant*, 1 Saund. 237; 1 Lev. 259; 1 Siderf. 482, S. C.

(*c*) 10 Car. I. Sess. 2, c. 4, Irish; 32 Hen. VIII. c. 34, English.

(*d*) *Broom v. Hore*, Cro. Eliz. 633; 3 Rep. 24, A., S. C. cited; *Rushden's case*, 1 Dyer, 4 B.

(*e*) *Midgley v. Lovelace*, 12 Mod. 45; *Carth.* 289; *Skinn.* 367, S. C.; see *Gilb. Debt*, 384; *Cooper v. Robinson*, 10 Mees. & W. 694.

(*f*) *Bro. Abr.* 228, B. Dette, pl. 93.

due by the lessee prior to his eviction, and after eviction by title paramount of parcel(*g*) of the premises, the rent subsequently accruing due to the lessor will, in an action of debt against the lessee or his assignee be apportioned.

8. Tenant for years or lives who assigns all his estate in demised premises reserving a profit rent, and without retaining(*h*) any reversion, though he cannot distrain, may support debt for the rent against his assignee: and where a person seised in fee demised for years rendering rent(*i*) and then granted the rent only, without the reversion, and the lessee attorned, it was contended that debt would not lie, as the privity of estate was not transferred, but it was ruled, that by the attornment the privity of contract passed to the grantee with the rent, and that he was entitled to recover: attornment being rendered unnecessary(*j*) by Statute, the grantee of a rent unaccompanied by the reversion(*k*), may now maintain debt against the lessee for recovery of the rent without any such formality.

9. The lessee, his executors, and administrators, continue liable to an action of debt for rent at the suit of the lessor or his assignee, while the lease subsists, as the lessee(*l*) cannot by his own act be discharged from responsibility: but if the lessee assign his interest to a third person with his lessor's concurrence, the privity of estate is destroyed, and the lessee will cease to be any longer answerable: in order to exonerate the lessee from liability for the rent in this form of action, it is necessary that the lessor should assent to the assignment of the lessee, either expressly, or by receiving rent from, or by recognizing the assignee as tenant, but before any such acceptance of the assignee as tenant, the lessor, at his election(*m*), may sue in debt either the lessee or his assignee: however, neither the receipt of rent from the assignee, nor the lessor's assent to the assignment, will relieve the lessee from the effect of an express covenant(*n*) for payment of rent.

Receipts are frequently given, acknowledging payment of rent from

(*g*) *Stevenson v. Lambard*, 2 East, 581; *Gamon v. Vernon*, 2 Lev. 251; *Thos. Jones*, 104. S. C.

(*h*) *Newcomb v. Harvey*, Carth. 161; *Lloyd v. Langford*, 2 Mod. 174; *Clarke v. Coughlan*, 3 Irish Law Rep. 427; *Baker v. Gostling*, 1 Bing. N. C. 19; 1 Scott, 58, S. C.

(*i*) *Robins v. Cox*, Thos. Raym. 11; 1 Lev. 22; *Marle v. Flake*, 3 Salk. 118.

(*j*) 6 Anne, c. 10, s. 10, Irish; 4 Anne, c. 16, s. 10, English.

(*k*) *Allen v. Bryan*, 5 B. & Cr. 512; *Clarke v. Coughlan*, 3 Irish Law Rep. 427.

(*l*) *Wadham v. Marlowe*, 4 Doug. 54; 2 Chitty's Rep. 600; 8 East, 314, note; 1 Hen. Blackst. 437, note.

(*m*) *Devereux v. Barlow*, 2 Saund. 182, and the note; *March v. Brace*, 2 Bulstr. 151; Cro. Jac. 334.

(*n*) *Arthur v. Vanderplank*, 7 Mod. 198; 2 Barn. 372; *Bacheloure v. Gage* W. Jones, 223.

ginal lessee or his representatives, by the hands of the assignee, passed in this form, not merely for the purpose of identifying the lease with the lease, but to retain the liability of the original lessee or his personal assets: however, as every lease is now prepared with an express covenant for payment of rent, the original lessee, or his representatives, always continue answerable, in whatever manner rent may be received, or the receipt be framed.

The assignee of a leasehold estate is only liable to payment of rent in respect of the privity of estate, which ceases when he loses that estate by assigning over, and an assignee, by transfer of the premises to a pauper, will be wholly exonerated from any claim of rent subsequently accruing.

All chattels real, on the decease of the owner, vest in his personal representatives, and cannot be rejected or disclaimed by them as of no value, as a partial renunciation of the administration allowed. Executors are chargeable, in their representative capacity, for rent accruing due upon a lease for lives or for years in their testator's life-time, and if executors enter into possession of demised premises holden *for years*, they may be sued for rent which fell due at the testator's death, at the option of the landlord, either as executors in the *detinet*, or personally in the *debet et detinet* as assignees of the term, whether they have assets or not, in respect of their receipt of the profits of the premises; and if the executors enter, they are personally liable for the current half-year's rent commencing and ending after the testator's death, though the testator received all the profits for five months, and the executors only enjoyed the premises for one month.

Where an executor enters, and a year's rent was due in the testator's life-time, and another year's rent becomes due after his death, demands may be included in the same action of debt in the *detinet* against the executor, or separate actions may be brought, charging the executor in the *detinet* for rent incurred in the testator's life-time, and in the *debet et detinet* for the subsequent rent: and where

Lovey v. Pitcher, Carth. 177; 2 Salk. 81; 4 Mod. 71; 3 Salk. 5; 1 Show. 340, S. C.; Taylor v. Taylor, 1 Bos. & P. 21; and see *ante*,

Bolton v. Canham, Pollex. 125; *Murst v. Speerman*, 1 Salk. 297; *Webster v. Webster*, Yelv. 103. *Levens v. Harridge*, 1 Saund. 1; *Hope v. Bague*, 3 East, 2.

(*r*) *Ld. Rich v. Frank*, Cro. Jac. 238; 1 Bulst. 22; *Helier v. Casebert*, 1 Lev. 127; 1 Sid. 240-266; *Hargrave's case*, 5 Rep. 31, A.

(*s*) *Bailiffs of Ipswich v. Martin*, Cro. Jac. 411; 3 Bulst. 211.

(*t*) *Smith v. Norfolk*, Cro. Car. 225; *Salter v. Codbolt*, 3 Lev. 74; *Aylmer v. Hide*, 1 Selw. N. P. 608.

a lease was made for years to two persons jointly, and one of them assigned his moiety, and the other died, and his executor entered upon the other moiety, it was ruled(*u*) that debt lay against such assignee and executor *jointly* in the *debet et detinet* for rent accruing due after the assignment, and after the testator's death. The executor of a lessee *pur autre vie* is not only chargeable in the *detinet* for any rent due on such freehold estate at the testator's death, but is also answerable for any rent subsequently incurring due and remaining unsatisfied to the testator's heir or devisee of such freehold estate, until the testator's assets are exhausted.

If a lessee for years assigns the term, his executor is not chargeable as assignee(*v*) because he could not have entered, but he is liable for debt for the rent in his representative capacity, unless the lessor has accepted the assignee as his tenant; if, however, the lessee had only an underlease of the premises, reserving rent, the executors will be personally answerable in case they receive such rents(*w*), as they cannot lawfully apply the profits arising from the land to any other purpose than payment of the rent: if the executor after entry assigns the lease, he is personally chargeable during the period of his enjoyment of the profits, and will only be liable in his character of executor for rent accruing due after his assignment. In an action of covenant against an assignee of parcel of demised premises held for years, the defendant by his plea denied that all the lessee's estate in such parcel came to him and vested in him, and it was ruled(*x*) that the production of letters of administration obtained by the defendant of the effects of the lessee without any proof of his *entry* on the premises, sustained the allegation that all the lessee's estate vested in him by assignment.

12. By the Irish Statute(*y*), 15 Geo. II. c. 8, s. 9, it is enacted that in case any tenants having power to determine their leases, by giving notice to quit the premises by them holden, shall give notice (*in writing*) of their intention to quit the premises by them holden, at the time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenants, their executors or administrators, shall from thenceforth pay

(*u*) *Bailiffs of Ipswich v. Martin*, 3 Bulstr. 211; 1 Ro. Rep. 404; Cro. Jac. 411; and see 1 Ro. Abr. 235, Apportionment, B. pl. 17.

(*v*) *Helier v. Casebert*, 1 Lev. 127.

(*w*) 2 Williams's Execut. 1249, note.

(*x*) *Wollaston v. Hakewill*, 3 Scott's N. R. 593; 3 Man. & Gr. 297, S. C.;

Green v. Ld. Listowell, 2 Irish L. Rep. 384.

(*y*) 15 Geo. II. c. 8, s. 9, Irish; Geo. II. c. 19, s. 18, English.

(*z*) The words "in writing" are not in the English Act; *Timmins v. Rowson*, 3 Burr. 1603; 1 Blackst. 533, S.

landlords or lessors, double the rent or sum which they should have paid, to be recovered at the same times, and in the same manner as the single rent or sum, before the giving such notice, could be recovered : and such double rent or sum shall continue^(a) during the time such tenants shall continue in possession.

This Statute is only applicable to cases where the tenant has power to put an end to his tenancy by notice, and has given valid^(b) notice for that purpose, upon which the landlord might have maintained an action : a tenant from year to year serving a notice of giving up possession, less than six months prior to the commencement of his tenancy, or at a wrong period of the year, cannot be compelled to pay double rent, if he holds over after the expiration of such defective notice. A tenant who serves notice of giving up possession, and continues to occupy the premises for a year after its expiration, on paying the double rent during that period, may, at the end of the year, leave the^(c) premises without being obliged to give the landlord any further notice. If the holding is by deed, the declaration must be framed in debt, and if the tenant holds by parol or by instrument not under seal, the declaration may be either^(d) in assumpsit or debt^(e), because the same form is given by the Statute for the double rent, as the landlord was to, before giving the notice, for recovery of the single rent ; and the declaration must allege that the notice^(f) by the tenant of his intention to quit was given in writing, and must shew that the notice was sufficient to put an end to the holding. A weekly tenant does not come within the Statute, so as to be chargeable with double rent.

By the Irish Statute^(h), 11 Anne, c. 2, it is enacted, that in any case where a tenant or tenants for any term for life, lives, or years (or other persons who shall come into possession of any lands, tenements, or hereditaments, by, from or under, or by collusion with such tenant or tenants), shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after

Both v. Macfarlane, 1 B. & Ad.

Johnstone v. Huddleston, 4 B. 922 ; 6 Dowl. & Ry. 155 ; *Doe v. Huddleston v. Johnstone*, M.C. & N. P. R. 591.

Both v. Macfarlane, 1 B. & Ad.

The precedent of a declaration by a landlord against his tenant for not giving notice of possession of a house, when the prior landlord recovered double

rent and costs against mesne landlord, *Jos. Chitty's Pleadings*, 145.

(e) See form of declaration, 2 *Chitty's Pleadings*, 495.

(f) *Farrel v. Donnelly*, 4 Irish Law Rep. 476 ; Longf. & T. 374 ; *Humberstone v. Dubois*, 10 Mees. & W. 765 ; 2 Dowl. Pr. Ca. 506, N. S.

(g) *Sullivan v. Bishop*, 2 Carr. & P. 359 ; *Lloyd v. Rosbee*, 2 Campb. N. P. C. 453.

(h) 11 Anne, c. 2, s. 1, Irish ; 4 Geo. II. c. 28, s. 1, English.

demand made, and notice in writing given for delivering the possession thereof by his or their landlords or lessors, his or their agent or a person thereunto lawfully authorized ; then such person or persons so holding over shall, for and during the time he and they shall so hold over, keep possession of the said premises, pay and forfeit to the landlord or landlords, lessor or lessors, his or their heirs, executors, administrators or assigns, or to such person or persons to whom the immediate possession of such lands expectant on the determination of such lease respectively belong, *double the yearly value* of the lands, tenements and hereditaments so detained, for so long time as the same are so detained, to be recovered by action of debt or trespass in any of His Majesty's courts of record.

The double value given by the preceding Act cannot be enforced by distress(*i*), and after recovery in ejectment(*j*), an action of debt lies for double the yearly value of demised premises, for the times during which the tenant overheld after the notice to quit expired. Service of a regular notice(*k*) to quit in writing by the landlord or his agent(*l*), or by a receiver under a Court of Equity, is of itself a sufficient demand for the purpose of charging a yearly tenant with double value in the event of his overholding ; and a notice to quit on a given day, or at such time as your holding shall expire next after the expiration of half a year from the receipt of the notice, is a sufficient demand(*m*) of possession to render the tenant liable to double value for holding over, but it is not sufficient whether one tenant is necessarily bound by the wilful holding over of his co-tenant.

A written notice or demand requiring the tenant to quit on the expiration of his lease or holding, may be served(*n*) during the continuance of the demise, or a notice demanding possession may be served after the expiration of the demise, provided the landlord has not, by his act, or by his acquiescence, recognized the party as a continuing tenant : a holding for a year certain having expired on the 24th of June, the landlord on the 11th of August following(*o*), served a notice in writing on the defendant to quit on that day, and at the same time demanded possession, and it was ruled that the landlord was entitled to recover double value from the time of serving the notice. When

(*i*) *Timmins v. Rowlinson*, 3 Burr. 1608.

(*j*) *Soulsby v. Neving*, 9 East, 310.

(*k*) *Wilkinson v. Colley*, 5 Burr. 2694 ; *Doc dem. Matthews v. Jackson*, 1 Doug. 175.

(*l*) *Poole v. Warren*, 8 Ad. & Ell.

582 ; 3 Nev. & P. 693.

(*m*) *Hirst v. Horn*, 6 Mees. 393.

(*n*) *Cutting v. Derby*, 2 W. 1075 ; *Wilkinson v. Colley*, 5 Burr. 2694 ; *Lake v. Smith*, 1 New Rep.

(*o*) *Cobb v. Stokes*, 8 East, 35

Owner of a woollen mill and steam-engine, let a room in the mill with a supply of power from the steam-engine, by means of a revolving shaft introduced into the room, it was ruled(*p*), in an action for double value against the tenant for holding over after the expiration of notice to quit, that the value of the power supplied could not be included in estimating such double value. A clear case of contumacy(*q*) must be established against a tenant in order to subject him to the penalty of the Act, as the holding over cannot be considered wilful, if the landlord's demand be resisted upon a *bonâ fide* assertion of title.

This Statute does not extend to weekly or monthly holdings, so as to render(*r*) occupiers for such periods liable to double value for overholding: though a tenant for half a year, or for a smaller portion of a year, may, for some purposes, be considered and denominated a tenant for years, yet a tenant(*s*) for a less period than a year cannot be included in the description of a tenant for years, so as to render him liable to double the yearly value for overholding demised premises.

14. By the Irish Statute(*t*) 25 Geo. II. c. 13, it is enacted, that where the sum to be demanded as double the yearly value of any lands, tenements or hereditaments, held over or detained, shall not exceed the sum of £20, it shall be lawful for the landlord or landlords, his or their heirs, executors, administrators or assigns, or for such person or persons to whom the immediate reversion of the premises expectant on the determination of such lease shall respectively belong, to recover such sum by civil bill to be exhibited against such tenant or tenants, or other person or persons, before the justices of assize at the respective assizes to be held for the county, wherein the lands so held over or detained do respectively lie, or before the justices of the quarter-sessions to be held for the county of Dublin, or for the county of the city of Dublin, in case the lands lie in either of such counties, and with like execution and remedy by appeal, as in other cases of civil bill.

The jurisdiction of the judges of assize was transferred(*u*) by the 36 Geo. III. c. 25, to the assistant-barristers, with the exception(*v*) of any action for recovery of a penalty given by Statute, which the judges of assize were empowered to determine by civil bill. The Statute(*w*) 6 & 7 Will. IV. c. 75, extends the jurisdiction of assistant-bar-

(*p*) Robinson *v.* Learoyd, 7 Mees. & W. 48.

(*q*) Wright *v.* Smith, 5 Espin. N. P. C. 203; Hirst *v.* Horn, 6 Mees. & W. 393.

(*r*) Lloyd *v.* Rosbee, 2 Campb. N. P. C. 453; Wilkinson *v.* Hall, 3 Bing. N.

C. 508; 4 Scott, 301, S. C.

(*s*) Sullivan *v.* Bishop, 2 Carr. & P. 359.

(*t*) 25 Geo. II. c. 13, s. 1, Irish.

(*u*) 36 Geo. III. c. 25, s. 6, Irish.

(*v*) 36 Geo. III. c. 25, s. 14, Irish.

(*w*) 6 & 7 Will. IV. c. 75, s. 1, Irish.

risters to all cases for the recovery of any penalty not exceeding £20, imposed or to be imposed by any Act of Parliament : under this clause it has been decided(*x*), that assistant-barristers have concurrent jurisdiction with the judges of assize to hear and determine actions by civil bill for double value, where the sum demanded does not exceed(*y*) £20.

15. In an action of debt for rent reserved by lease, when founded on privity of contract, the venue is transitory, and may be laid in any county at the election of the plaintiff, but an action of debt depending on privity of estate is local, and can only be brought in the county where the lands are situated : the venue is transitory in an action of debt for rent(*z*) by the lessor, or by his heir or personal representatives against the lessee, or against any person deriving from the lessee in a representative character, but where the action is brought by lessor against an assignee of the lessee, or by an assignee of the reversion against the lessee or his assignee, the venue must be laid in the proper county, the action being in such cases founded on privity of estate.

An action of debt by the lessor against the executors of lessee for arrears of rent, which accrued due in the testator's life-time, is transitory, or an action in the *detinet* against the executors of lessee, for rent which became due in their own time, but an action(*a*) in the *debet et detinet* against executors for rent which accrued during their own occupation must be brought in the proper county where the lands lie, because the executors are charged as assignees of the tenant's interest in respect of privity of estate, and not in their representative capacity. If, however, a local action be brought and tried in a wrong county, the defect(*b*) is aided after verdict by the Irish Statute(*c*), 17 & 18 Car. II. c. 12, and advantage can only be taken of the wrong venue by demurrer. An action of debt founded on privity of contract(*d*), may be brought in Ireland for rent of lands situate in England or in Jamaica, but an action depending on the privity of estate(*e*) can only be maintained in the country where the lands lie. An action of debt under

(*x*) Watt v. Corr, Longf. Civil Bills, 23.

(*y*) The authority of the assistant-barrister extends to £20, present currency, while the judges of assize are restricted to £20 of the late currency.

(*z*) Thursby v. Plant, 1 Saund. 241, C.; Patterson v. Scott, 2 Stra. 776; Bulwer's case, 7 Rep. 1, A.

(*a*) Cormel v. Lisset, 2 Lev. 80; Thursby v. Plant, 1 Saund. 241, C. note

T.; Bull. N. P. 177.

(*b*) Mayor, &c. of London v. Cole, T. R. 583-588; Bailiffs, &c. of Litchfield v. Slater, Willes, 431.

(*c*) 17 & 18 Car. II. c. 12, Irish; 1 & 17 Car. II. c. 8, English.

(*d*) Wey v. Yally, 6 Mod. 194; Salk. 651; Cases temp. Holt, 705, S.

(*e*) Barker v. Damer, 3 Mod. 33; Carth. 182; 1 Salk. 80; 1 Show. 19; Thrale v. Cornwall, 1 Wils. 165.

Statute(*f*), 10 Car. I. Sess. 2, c. 5, brought by an executor or administrator of a tenant in fee simple, or for lives(*g*), is local.

An established rule of pleading requires that any deed constituting the foundation of the action should be set out in the declaration, except for rent the statement of the lease is only matter of inducement, and the enjoyment of the premises forms the subject of complaint; and therefore it is sufficient to allege generally in declaring in rent, that the lessor demised the premises for a certain term, whether of a holding(*i*) by indenture or under a parol demise, in the action, unless the demised premises consist of tithes(*j*) or incorporeal hereditaments which can only pass by deed.

Every deed or other contract should be stated in pleading according to its legal operation and effect, and it was observed(*k*) by Holt, C. J., that a sufficient declaration might be framed without the words contained in the deed, except the sum and the names of the parties: Pollexfen, C. J., held that in an avowry making title to a defendant was bound to plead a deed according(*l*) to its legal operation, and when the words "give, grant, release and confirm," were used in a conveyance, that the party pleading ought to rely only on the words of them; and Holt, C. J., is reported to have said, in the case, on a writ of error(*m*), that if tenant for life grant his estate in fee simple, and it be pleaded as a grant, it will be ill pleading, and ought to be pleaded as a surrender according to its legal operation; and to plead the deed generally, and leave its construction to the Court, as to induce uncertainty, because every person then would have to go to the deed to the Court, and allow the judges to make the best of it; and the party ought to shew his title with certainty, and make his declaration in what manner he had taken his estate, or supposed the deed to be.

The true rule on this subject recognized(*n*) by Treby, C. J., is that the deed must be stated either *in hæc verba*, or according to its

10 Car. I. Sess. 2, c. 5, Irish; 32 C. 2, c. 37, English.

11 Mod. 177.

11 Mod. 107-323-382; 2 Stra.

11 Mod. 104.

11 Mod. 314, N.

11 Mod. 276, D.

11 Mod. 430, note B.

11 Mod. 298, n. 2.

11 Mod. 217;

2 Taunt. 707, S. C.

(*l*) Baker v. Lade, 3 Lev. 291; 4 Mod. 149; Carth. 253; Comb. 199; Lade v. Baker, 2 Ventr. 149-260; Wickes v. Gordon, 1 Chitty's Rep. 67, by Holroyd, J.

(*m*) Baker v. Lane, Skinn. 315; Chester v. Willan, 2 Saund. 97, B. note 2; Thursby v. Plant, 1 Saund. 235, B. note 9.

(*n*) Challoner v. Davies, 1 Ld. Raym. 400-404; 1 Lutw. 569, S. C.; Fox's case, 8 Rep. 93, B.

substance and effect, and that a party having taken upon himself to state in his declaration a deed according to its supposed operation, where it could not have any such operation, and was not set out upon oyer, the pleading could not be supported. A declaration setting out an agreement(o) containing express words of demise, and stipulating for a future lease, need not allege whether the instrument is to be deemed a lease, or an executory agreement, and a *fac simile*(p) of a deed, however incorrect and illiterate it may be, when introduced into a declaration, will be read by the Court, so as to give it a rational interpretation. If a party wishes the Court to construe a deed for him, he should(q) set it out *in hæc verba*, or at least so much of it as he means to rely on; but where a plea purports to state a deed according to its legal operation, the Court cannot give it a different effect: when title is essential to the action, as in replevin, it is incumbent on a party who takes upon himself(r) to set out his title, to state it correctly, and he is not to call on the Court to make out title for him, and accordingly it will be found, that all the cases in which the rule of pleading a conveyance according to its legal operation has been applied, are cases in which the conveyance was set forth for the purpose of shewing title, but in an action of covenant, it is immaterial under what conveyance the plaintiff holds, as it is only set out to shew the covenant, and not for the purpose of making title to the lands.

18. If a party claim, or justify under a deed alleged in pleading, *profert* of it must be made, and a copy of the instrument must be furnished to the adverse party, if required, before any plea can be enforced; or an excuse for the omission of *profert* must be made, either by stating the deed to have been lost, or to be in the hands of the opposite party(s), but an excuse(t) that the deed is in the possession of a third person is insufficient, without alleging that such person refused to produce the instrument: it is unnecessary(u) to make *profert* of deeds,

(o) Price v. Williams, 1 Mees. & W. 6-14; Tyrw. & Gr. 197, S. C.

(p) Smith v. Bernard, referred to in Chitty on Pleading, vol. i. 400, note K.

(q) Moore v. Ld. Plymouth, 3 B. & Ald. 66; 7 Taunt. 614-626; 1 Moore, 346; Ross v. Parker, 1 B. & Cress. 358; 2 D. & Ry. 662; Powell v. Horton, 2 Bing. N. C. 676, by Tindal, C. J.

(r) Cleyburne v. Piercy, Smith & B. 412-422; Moore v. Ld. Plymouth, 3 B. & Ald. 73, by Holroyd; Price v. Williams, 1 Mees. & W. 14; Tyrw. & Gr. 197; Hozier v. Powell, 3 Irish Law Rep. 395; Monnington v. William, 1

Ventr. 109; Thos. Raym. 200, S. C.

(s) Fisher v. Ford, 12 Ad. & Ell. 654; 4 P. & Dav. 347.

(t) Hill v. Marsden, 6 Mees. & W. 718; Read v. Brookman, 3 T. R. 151.

(u) Estofte v. Vaughan, 3 Dyer, 277, A.; Ld. Huntingdon v. Mildmay, Cro. Jac. 17; Stockman v. Hampton, Cro. Car. 441; W. Jones, 377; Welbie's case, Noy, 145; Reynell v. Long, Carth. 315; Hargr. note 25 to Co. Litt. 6; Bolton v. The Bishop of Carlisle, 2 H. Bla. 262; Denman v. Ball, 9 Moore, 593; The King v. Jones, 1 Jones's Exch. Rep. 643.

fect under the Statute of Uses, because before the Statute the supposed to be in the hands of the grantee to uses, and the pleading has not been altered by the Statute ; but this principle applies(*v*) where a grantee to uses is interposed, as if lands be A. B. to the use of J. S. for life, although the use be executed by a tenant for life, yet *profert* of the conveyance is not required; and a declaration of debt for rent reserved by deeds of lease and release, in passing an estate of freehold, if the release(*w*) be stated, will be necessary, as such a conveyance derives its effect from common law, and not by force of the Statute of Uses : a party not in possession of a deed(*x*), need not make *profert* of the instrument upon this ground, a surety may plead a release(*y*) to his obligation without offering by his plea to produce the deed.

In a freehold lease, containing the usual recital of a lease for a year declared on as a bargain and sale accompanying the deed of release, it is wholly unnecessary either to make *profert* of, or produce in evidence any such bargain and sale, as by the Irish Statute(*z*), 9 Geo. II. c. 5, the recital of a lease for a year in the deed of release, is deemed sufficient evidence of such lease, and by the Irish Statute, 1 Geo. III. c. 3, in all cases of pleading deeds of lease and release, when it may be necessary to allege the bringing such deeds into Court, it is made sufficient to allege the bringing into Court the deed of release, and the recital of such lease for a year in the release, to be as effectual as its production. By the Statute, 4 & 5 Vict. c. 20, s. 4, a release(*b*) of a freehold estate, executed after the 15th of May, 1841, and expressed to be made in pursuance of the Act, is rendered as effectual, as if the parties had executed a deed of bargain and sale, for the purpose of the conveyance. By these Acts a party is enabled to make a release for a year in any manner not inconsistent with its recital of a lease, and *profert* is altogether dispensed with. If a conveyance of a lease be informally(*c*) prepared, omitting any recital of a bargain and sale, or any reference to the late Act on the subject, it is necessary to state the instrument in pleading according to its nature, and either to rely on it as a lease at common law, with

in *v. Peace*, 6 Mees. & W.

land v. Healey, Alc. & Nap.

in *v. Peace*, 6 Mees. & W.

gerfield v. Thomas, 9 Ad. &

1 P. & Dav. 287, S. C.

(*y*) *Bain v. Cooper*, 1 Dowl. Pra. Ca. 11, N. S.

(*z*) 9 Geo. II. c. 5, s. 6, Irish ; *Jenkins v. Peace*, 6 Mees. & W. 722.

(*a*) 1 Geo. III. c. 3, Irish.

(*b*) 4 & 5 Vict. c. 21, Eng. & Irish.

(*c*) *Ante*, Book II. c. 1, pl. 20, p. 196.

livery of seisin, or where circumstances warrant the construction of it as a grant of the reversion, or as an enlargement of the estate previously existing in the releasee.

20. Where *profert* is made of a deed, the adverse party must give notice before he has pleaded, demand *oyer*, and such requirement must be complied with(e) by furnishing an exact transcript of the instrument: it is in the discretion of the party who obtains *oyer*, whether he shall set out the deed in his plea, but if he omit(f) doing so, the plaintiff may insert it in his replication, and if the instrument of the deed is granted be set forth in the pleadings, it will be considered as part of the record: if the defendant, after getting *oyer* of a deed, sets out in his plea(g) only part of the instrument, or mis-recites it, the plaintiff may sign judgement as for want of a plea, or the plea may be set aside. If a party states in his declaration the legal effect of a deed, and on *oyer* its meaning appears different from the meaning attributed to it in the declaration, in order to take advantage of the variance the defendant should plead(h) *non est factum* without setting out the deed: if the deed does not support the breach, the defendant may demur: if the deed be set out on *oyer*, and *factum* be pleaded, the only question on the trial of that is whether the deed, the tenor of which is stated, was executed by the defendant or not, because the instrument, when set out, is taken in fact the statement(i), of the plaintiff, and forms part of the record: so where the defendant pleads a deed, and the plaintiff demands *oyer*, and, without setting out the instrument, pleads "*non est factum*" and, serves notice of trial, the defendant may rejoin, pray that the deed may be enrolled, as a party who gives *oyer* has a right to have the deed set out in some part of the record: an endorsement on a deed before its execution, forms part(k) of the instrument, and must be set out on *oyer*, but an endorsement made on a deed after its execution(l), need not be set out, though it may vary the effect of the instrument.

(d) Goodtitle *dem.* Edwards v. Bailey, 1 Cowp. 600; Doe *dem.* Were v. Cole, 7 B. & Cress. 243; 1 M. & Ry. 33; Cooper v. Hamilton, 4 Irish Law Rep. 225.

(e) Waugh v. Bussell, 1 Marsh. 217; 5 Taunt. 707.

(f) Jevens v. Harridge, 1 Saund. 9, B. note 1; The Weavers' Co. v. Forrest, 2 Stra. 1241; Simmonds v. Parmenter, 1 Wils. 97.

(g) Wallace v. The Duchess of Cum-

berland, 4 T. R. 370.

(h) Snell v. Snell, 4 B. & Cress. 243; 1 M. & Ry. 33; Cooper v. Hamilton, 4 Irish Law Rep. 225.

(i) Paine v. Emery, 5 B. & Cress. 306; 5 Tyrw. 1097.

(j) Smith v. Jennings, 1 B. & Cress. 155.

(k) Cook v. Remington, 2 Salk. 498.

(l) Smith v. Goldsworthy, 1 Pr. Ca. 288, N. S.

CHAPTER X.

ACTIONS OF DEBT AND COVENANT.

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| <p>21. <i>Assignee must shew that Lessor had a Reversion.</i></p> <p>22. <i>Declaration by Assignee must trace his own Estate.</i></p> <p>23. — <i>does not lie by Chief-Landlord against Undertenant.</i></p> <p>24. <i>Debt lies against Assignee of Lessee in Parcel.</i></p> <p>25. <i>Plea of nil debet.</i></p> <p>26. <i>Riens in arriere.</i></p> <p>27. <i>Nil habuit.</i></p> <p>28. <i>Assignment by Lessee, and Acceptance of Assignee as Tenant.</i></p> <p>29. <i>Plea of Infancy.</i></p> <p style="text-align: center;">ACTION OF COVENANT.</p> <p>30. <i>Statement of Breach.</i></p> <p>31. — <i>must not be more extensive than the Covenant.</i></p> <p>32. — <i>ought not to be assigned too generally.</i></p> | <p>33. <i>Statement of Breach ought not to be narrowed by adding affirmative Words.</i></p> <p>34. <i>Assignment of Breach on Disjunctive Covenant.</i></p> <p>35. <i>Covenantees who can sue jointly are bound to do so.</i></p> <p>36. <i>Non est factum.</i></p> <p>37. <i>Payment.</i></p> <p>38. <i>Covenant cannot be discharged by Parol.</i></p> <p>39. <i>Accord and Satisfaction, when valid.</i></p> <p>40. <i>Accord must be executed before Action brought.</i></p> <p>41. <i>Satisfaction must be adequate, and Accord certain.</i></p> <p>42. <i>Eviction.</i></p> <p>43. <i>Determination of Lessor's Estate.</i></p> <p>44. <i>Set-off.</i></p> <p>45. <i>Other Pleas in Covenant.</i></p> |
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21. It is unnecessary that a lessor should set out (a) his title in an action of debt, or covenant, because the lease operates as an estoppel on the lessee, and those deriving from him : but where a plaintiff sues as assignee of the reversion, or as heir, or executor, the declaration must shew that the lessor had such a reversion, which afterwards vested in the plaintiff, as would enable him to maintain the action for recovery of the debt or damages claimed : it is not requisite, however, to set forth the commencement of the lessor's estate, because the title is only alleged by way of inducement. A declaration by an assignee of the reversion may state that the lessor, at the time of making the demise, was seised in his demesne as of freehold for a term of three lives, whereof one is still in being ; or where the landlord has a lease of lives with covenant for renewal for ever, and all the *cestuique vies* (b) who were in being at the time of making the underlease have died, but the landlord's interest has been kept subsisting by successive renewals, it will be sufficient to allege in the declaration that the lessor, at the time of

(a) *Gold v. Barnsly*, Carter, 30 ;
Leberry v. Walby, 1 Stra. 230 ; Scilly
Dally, 2 Salk. 562.

(b) *Dignum v. Palmer*, 2 Fox & Sm.
 318.

making the demise, was seised in his demesne as of freehold, to him and his heirs, by virtue of a lease for three lives, and which lease(c) is still subsisting : or that the lessor was possessed of the demised premises for the residue of a term for years, whereof twenty years(d) and upwards were then to come and unexpired, and which is still subsisting. By declaration in covenant, it was alleged that the lessor, being possessed of certain premises for the remainder of a term of twenty-two years commencing from the 25th of December, 1797, by indenture made, & demised to the defendant, &c. and that the lessor afterwards granted a his estate in the demised premises to the plaintiff for the residue of the term of twenty-two years : the defendant pleaded that the lessor was not at the time of making the demise, possessed for the residue of the term of twenty-two years ; and upon demurrer(e), the plea was held sufficient and the Court ruled, if the case had proceeded to trial, and the jury had found that the lessor was possessed of the premises for a shorter term than the verdict should have been entered on such finding in the plaintiff's favour, provided it appeared that a reversion was vested in the plaintiff enabling him to support the action. It is admitted that the precise term which the plaintiff had in the lands at the time of the demise is not an essential fact ; and it would seem to follow that a plea(f), denying the existence of such precise term, was no answer to the declaration and could not be supported on demurrer.

Where a lessor had only an equitable interest for a term of years under a covenant for renewal, at the time of making the demise, a declaration in debt or covenant may allege, that before making the underlease the chief-landlord demised the premises to J. S.(g), his executors and assigns, to hold for one year thence next ensuing, and so from year to year, so long as both parties should please, by virtue whereof J. S. entered and became possessed, and being so possessed, demised to the defendant for twenty-one years, &c. A demise in this form does not determine upon the death of the intermediate landlord, J. S., and it is not essential that, at the time of making the underlease, he should have a title co-extensive with, or exceeding the quantity of the interest demised, provided such interest has in fact continued. It was observed

(c) 5 Geo. II. c. 4, s. 4, Irish ; 4 Geo. II. c. 18, s. 6, English.

(d) 2 Chitty's Plead. 564, note C. ; Com. Dig. Pleader, C. 43 ; Cudlip v. Rundle, Carth. 202.

(e) Carvick v. Blagrove, 1 Br. & B. 537 ; 4 Moore, 303 ; but see Warburton v. Ivie, 1 Jones's Exch. Rep. 329-331 ;

Lennon v. Palmer, 5 Irish Law Rep. 10

(f) Warburton v. Ivie, 1 Jones's Exch. Rep. 329, by Joy. Ch. B.

(g) Mackay v. Mackreth, 4 Doct. 213 ; 2 Chitty's Rep. 461 ; Parker Harris, Skinn. 307 ; Peirse v. Sharr, M. & Ry. 418.

by Buller, J., that the pleading in the preceding case would have been more accurate, by stating that J. S., the intermediate lessor, had a long term for years *then and yet to come*, which would have been established in evidence by the demise set forth, because a lease from year to year, which continues for ten years, may be stated in pleading as a lease for ten years.

22. In an action of debt, or of covenant, *by* an assignee of the lessor's estate in the reversion, or by an assignee of the lessee's interest in demised premises, the declaration(*h*) must state specifically all the intermediate assignments, until the property be traced to the plaintiff; and a general allegation that all the estate, either of the lessor or of the lessee, came to the plaintiff by assignment, cannot be sustained: but where an action is brought *against* the assignee of a term, such general form of pleading is allowed, and an averment(*i*) that "all the estate of the lessee in the demised premises came to the defendant by assignment thereof," will be sufficient, because the plaintiff is presumed to be unacquainted with the particulars of his adversary's title. However, it is not sufficient merely to allege in the declaration that the demised premises came to the defendant by assignment; but it must be shewn that the defendant is assignee of the lessee's estate(*j*), for, otherwise, the defendant might be assignee of another estate in the premises, and not of the interest(*k*) in respect of which the rent is claimed. If an heir(*l*), or executor(*m*), enter into possession, or into receipt of the rents of demised premises, they may be sued in the character of assignees for rent which became due after they entered.

23. An action of debt or covenant does not lie at the suit of a chief landlord against an undertenant(*n*), because an undertenant does not represent the entire interest under the original lease. The Earl of Derby demised for three lives to Thomas Taylor, who, by indenture, demised, granted, bargained, sold and *assigned* all his estate and interest in the demised premises to James Twist, his executors, &c. for the term of ninety-nine years, provided the *cestuique vies*(*o*) named in the original lease, or either of them, should so long live: Lord Derby declared against Twist, as assignee of the original lease, for breach of

(*h*) Dean and Chapter of Bristol *v.* Guye, 1 Saund. 112, A. note 1; Pitt *v.* Russel, 3 Lev. 19.

(*i*) Cotes *v.* Wade, 1 Lev. 190; Pitt *v.* Russel, 3 Lev. 19.

(*j*) Huckle *v.* Wye, Carth. 255.

(*k*) Merceron *v.* Dowson, 5 B. & Cr. 479-483, by Bayley, J.; 8 D. & Ry. 264.

(*l*) Derisley *v.* Custance, 4 T. R. 76.

(*m*) Buckley *v.* Pirk, 1 Salk. 317; Tilney *v.* Norris, Carth. 519; 1 Salk. 309; 1 Ld. Raym. 553, S. C.

(*n*) Holford *v.* Hatch, 1 Doug. 183; Palmer *v.* Edwards, 1 Doug. 187, in the note.

(*o*) The Earl of Derby *v.* Taylor, 1 East, 502; but see the Irish Subletting Act, 2 Will. IV. c. 17, s. 8.

covenant, and upon a plea denying the assignment, it was decided the whole estate of the lessee did not pass to Twist, and that the covenant could not be supported.

24. An action, either of debt or of covenant, lies against an assignee of the whole of the lessee's interest in parcel of the demised premises, for a proportion of the reserved rent. A lessee having assigned a moiety of the land for his whole term, it was ruled(*p*) that the assignee of the entire interest in a moiety of the premises, had sufficient estate to warrant his being charged by the lessor in debt for a moiety of the rent. So an assignee of the lessee's estate in parcel of demised premises, is chargeable in an action of covenant(*q*) for not keeping his part in repair. Where a lessee subdivides his entire interest(*r*) amongst several persons, either as tenants in common, or as joint tenants, or as coparceners, or as tenants in severalty, the lessor may bring debt for rent against all the tenants amongst whom the whole interest is subdivided, as the severance of the lessee's estate shall not occasion any severance of the action; but if an action of covenant be brought against one of the tenants in common singly, charging him exclusively as assignee of the whole of the lessee's interest in the premises, in order to protect him from liability to the whole demand, he must(*s*), by his plea, deny the assignment of part, and must confine his defence to the repairs of his shares; and it seems doubtful whether such defence should be pleaded in abatement, as each tenant in common has a partial interest in the whole property.

An action either of debt or covenant for rent, lies against the assignee of the whole of the lessee's estate in demised premises, after the whole of parcel(*t*) by title paramount; and upon a declaration for the rent, the assignee must plead, as to part of the rent, his eviction of parcel of the land, when the rent will be apportioned. How far an action of debt or covenant for rent, against a party, as assignee of the whole of the lessee's estate in the whole of the demised premises, if it be shewn, upon the plea of assignment, is *in abatement* (*u*) of the assignment, that the defendant is, in fact, only an assignee of part, is a question which has not been decided.

(*p*) *Gamon v. Vernon*, 2 Lev. 231; *Thos. Jones*, 104; *Wollaston v. Hake-will*, 3 Scott's N. R. 551; 3 Mann. & Gr. 297, S. C.

(*q*) *Congham v. King*, Cro. Car. 222; *Conan v. Kemise*, W. Jones, 245.

(*r*) *Bailiffs of Ipswich v. Martin*, 3 Bulstr. 211; Cro. Jac. 411; 1 Ro. Rep. 404; but see 1 Ro. Abr. 235, Appor-tionment, pl. 17; *Waldron v. Vicars*, Palmer, 283.

(*s*) *Merceron v. Dowson*, 5 D. & Ry. 479; 8 D. & Ry. 264; but see *Spitty*, 1 Bing. N. C. 756; 1 Sc. C. 100.

(*t*) *Stevenson v. Lambard*, 1 Sc. C. 575.

(*u*) *Hare v. Cator*, 2 Cow. 205; *Curtis v. Spitty*, 1 Bing. N. C. 737; 1 Sc. C. 737, S. C.; and see Noel 4 Legal Examiner, 141, for 1834, with the observations of Mr. Justice G. C. J.

of part, the plaintiff will be nonsuited, because, by an assignment of part, no privity of estate can exist in respect of the whole land, and, therefore, such partial assignee should only be charged according to the truth of the case. One Warburton being possessed of land for the residue unexpired of a long term of years, by indenture(*v*) assigned all his term in the premises to G. Keogh and T. Keogh, reserving a yearly rent, which the Keoghs covenanted to pay: in an action for breach of covenant, brought by the administratrix of Warburton against George Ivie and William Hughes, for nonpayment of rent, as assignees of all the estate and interest of the lessees in the premises, the defendant, George Ivie, pleaded in bar of the action, that before any part of the rent claimed became due, William Hughes, by indenture, assigned all his undivided moiety of the lands to Henry Ivie, for the residue unexpired of the term: and a demurrer to this plea was overruled, upon the ground that, by accepting the assignment, the defendants jointly contracted to pay each gale of rent according as it fell due, and one of them having assigned over, was no longer liable. In an action for breach of covenant against two defendants, as assignees of the estate of the lessee, for nonpayment of rent(*w*), one of the defendants pleaded in abatement the non-joinder of another person, who was a joint-assignee of the term, and averred that the breaches of covenant were committed by the defendants, jointly with such third person: a demurrer to this plea was allowed, because the defendant, being a joint-tenant, was cognizant of, and ought to set out the assignment specially; and in this respect the case was distinguished from *Hare v. Cator*(*x*), where the defendant was only assignee of parcel.

25. *Nil debet* is the general issue in debt for rent, and is a good plea, although the declaration allege the rent to be reserved(*y*) by indenture, because the statement of the lease is only matter of inducement, and the enjoyment(*z*) of the premises is the foundation of the action: this plea amounts to a denial(*a*) of the demise, and of every material fact alleged in the declaration, and enables the defendant to bring forward evidence, shewing that no such debt is owing by him as is claimed, and under this issue the defendant may prove(*b*) payment

(*v*) *Warburton v. Ivie*, 1 Jones's Exch. Rep. 313-324.

(*w*) *Heap v. Livingston*, 11 Mees. & W. 896.

(*x*) *Hare v. Cator*, 2 Cowp. 766.

(*y*) *Warren v. Consett*, 2 Ld. Raym. 1503; *Dean and Chapter of Windsor v. Gover*, 2 Saund. 297, note 1; *Jones v.*

Pope, 1 Saund. 38, A. note 3.

(*z*) *Wadham v. Marlowe*, 4 Doug. 54-70; 8 East, 315, n.

(*a*) It is said that this plea does not put in issue the deed of demise; *Comyns's Landlord and Tenant*, 536; but see *Warner v. Theobald*, 2 Cowp. 588.

(*b*) *Gallaway v. Susach*, 1 Salk. 284.

of the demand before action brought, or that the rent was levied in distress, or otherwise satisfied, or that the lessor evicted(c) him, or that the tenant lost(d) possession of some part of the demised premises, until the rent claimed became due. If the lessor enter wrongfully and ouster the tenant from parcel of the premises, the entire(e) rent will be suspended, and cannot be apportioned, but if the lessor or landlord enter by right into parcel, upon the plea of *nil debet*, the rent may be apportioned according to the rateable value of the part of the lands held by the tenant, unless the rent has been ascertained by the contract between the parties: eviction by title paramount may also be given(f) in evidence under the plea of *nil debet*.

26. *Riens in arrere* may be pleaded in debt for rent, but it is seldom adopted, for its operation as a defence is not so extensive as the plea of *nil debet*: *riens in arrere* is a bad plea in an action(g) for breach of covenant, because it confesses that the covenant was broken, but it tends only in mitigation of damages, but the action of debt being for recovery of a specific sum, if that be paid at any time before bringing the action, there can be no damages for the detention.

27. If a declaration in debt for rent set out a demise by indenture, a plea(h) of “*non dimisit*,” or of “*nil habuit*”(i), or that the defendant had no sufficient estate in the demised premises, cannot be supported, but where a declaration merely alleges a demise, without stating it to have been made by indenture, the defendant may plead “*non dimisit*,” or “*nil habuit*”(k), and the plaintiff, if warranted by the facts, must in his replication rely on an estoppel by indenture, for if he joins(l) issue on the plea, he will lose the benefit of the estoppel, and be obliged to prove title. A plea of “*nil habuit*”(m) cannot be supported in *assumpsit* for use and occupation, and as a similar form of defence in debt for use and occupation, founded on a bygone consideration, has been sanctioned, the plea(n) of “*nil habuit*” is not allowed as a defence in the latter action.

(c) *Salmon v. Smith*, 1 Saund. 204, notes 2 and f.; *Browne's case*, 1 Mod. 118; *Drake v. Beare*, 1 Lev. 104; Bull. N. P. 177.

(d) *Tomlinson v. Day*, 2 Br. & Bing. 680; 5 Moore, 564; 2 Ro. Abr. 677; Triall. pl. 21; *Chettle v. Pound*, 1 Ld. Raym. 746.

(e) *Hodgkins v. Robson*, 1 Ventr. 277; Pollexf. 141; 1 Freem. 404, 413, and 417.

(f) *Salmon v. Smith*, 1 Saund. 204, note f.

(g) *Warner v. Theobald*, 2 Cowp. 588.

(h) *Taylor v. Needham*, 2 Ld. Raym. 278.

(i) *Kemp v. Goodal*, 1 Salk. 1154; *Heath v. Veale*, 3 Lev. 146; *Parker v. Manning*, 1 R. 537, in covenant.

(j) *Taylor v. Needham*, 2 Ld. Raym. 280.

(k) *Duppa v. Mayo*, 1 Saund. note 1; *Veale v. Warner*, 1 Saund. A. note C.; *Gill v. Glasse*, Yel. Cro. Jac. 312; 2 Bulstr. 41.

(l) *Wilkins v. Wingate*, 6 T. R. 146.

(m) *Lewis v. Willis*, 1 Wils. 146.

(n) *Curtis v. Spitty*, 1 Bing. 146.

28. An assignment by lessee prior to any part of the rent claimed having become due, and acceptance of the assignee(o) by the lessor as his tenant, is a good plea to an action of debt for rent against the first lessee: and when the action is brought against an assignee of the lessee, a plea of assignment over, before any part of the rent demanded accrued due, is a valid defence, without alleging any acceptance by the lessor. In an action of debt for rent, the lessee may plead that he was ready to enter upon the demised premises, but was obstructed(p) by the plaintiff, who would not allow him to do so.

29. A lease granted to an infant for a term of years rendering rent, is not absolutely void, but may be avoided by him at any time during his minority, by waiving the land before the rent-day arrives, or upon the infant's attaining his full age: however, if the infant continue in the occupation(q) of premises demised to him, after a rent-day, he will be liable to the rent then due, or if he occupy the land, or acquiesce in the lease(r) after attaining his full age, he will be answerable for any arrears of rent which accrued during his infancy, and he cannot afterwards disaffirm the contract during the continuance of the lease. If the infant means to avoid the lease, he must give the landlord notice of his intention to do so, within a reasonable time(s) after attaining his age of twenty-one years. In debt for rent on a lease for years, the defendant pleaded infancy at the time the lease was made, and upon demurrer(t) to the plea, it was decided, that the lease was only voidable at the election of the infant, and if he waived the land before the rent-day during his minority, the action could not be sustained; but as it was not shewn that the rent was too high, and as the defendant had attained his full age before the rent-day, judgement was given for the plaintiff.

In the case of a lease granted to an infant, it is equivocal in the original(u) constitution of the estate, whether it was not for his benefit, and as a possession and a right to the estate is conferred on the infant, his continuance in the occupation after full age, is an adoption of

15; 4 Moo. & Sc. 554.

(o) *March v. Brace*, 2 Bulstr. 151; Cro. Jac. 334; *Marrow v. Turpin*, Cro. Eliz. 715; Moor. 600; *Thursby v. Plant*, 1 Saund. 240, and note 5.

(p) *Hawkes v. Orton*, 5 Ad. & Ell. 375, by Littledale, J.; 6 Nev. & M. 842, 8. C.

(q) *Bottiller v. Newport*, Year Book, 21 Hen. VI. fo. 31, pl. 18, B., by Newton, arg.

(r) *Kettle v. Elliot*, 1 Ro. Abr. 731;

Enfants, K.

(s) *Holmes v. Blogg*, 8 Taunt. 35-508; 1 Moore, 466; 2 Moo. 552.

(t) *Ketley's case*, 1 Brownl. 120; *Kettle v. Elliott*, 1 Ro. Abr. 731; *Kirton v. Elliott*, 2 Bulstr. 69; *Ketsey's case*, Cro. Jac. 320; *Evelyn v. Chichester*, 3 Burr. 1719.

(u) *Baylis v. Dineley*, 3 M. & Selw. 481, by Ld. Ellenborough; and see *Goode v. Harrison*, 5 B. & Ald. 154, by Littledale, argo.

the interest. A lease for years of a dwelling-house in Dublin, by assignment, came to Lawrence Osbrey, an infant, and the demised premises having afterwards been evicted(*v*) for non-payment of rent, an action of debt was brought by the assignee of the reversion, against the infant as assignee of the lessee, for half a year's rent due prior to the eviction: the defendant by his guardian pleaded, that at the time the rent became due he was, and at the time of bringing the action still continued an infant, and on demurrer to the plea, the Court of Exchequer held, that the infant was answerable for the rent during his enjoyment of the premises.

All contracts made by infants from which they do not derive any apparent benefit, are absolutely(*w*) void, but those from which they may receive benefit are only voidable, and may be confirmed by them when they come of age. An infant cannot bind himself by covenant(*x*), nor in a bond with a penalty(*y*), nor can he state an account(*z*), nor can any trading contract(*a*) be enforced against him, because the law pronounces such engagements to be prejudicial to the infant, and they are absolutely void. An infant may hire a suitable lodging(*b*) for his residence, and is answerable for the rent in an action for use and occupation, because the infant must have some place of habitation; but if an infant hire a shop, or other place for the purpose of carrying on a trade, the contract is absolutely void: where an infant hired a house(*c*) consisting of a shop and a parlour on the ground floor, and three rooms up stairs, for the purpose of carrying on his occupation of a barber, Tindal, C. J., held, that the infant was not liable for the hire of a house used for the purposes of his trade, and if the occupation was not to be deemed a trade, the question would be, whether the contract on which he was sued was a contract for necessaries, which was a proper subject for the consideration of the jury.

30. In actions of covenant, the declaration must allege a violation of the covenant by reason of some act having been done, or by the omission to do some act contrary to its stipulations, and the breach

(*v*) *Billing v. Osbrey*, Exch. Hil. 1829, MSS; see *ante*, 113.

(*w*) *Lloyd v. Gregory*, Cro. Car. 502; *Keane v. Boycott*, 2 H. Blackst. 511-515.

(*x*) *Farnham v. Atkins*, 1 Siderf. 446; *Lyly's case*, 7 Mod. 15.

(*y*) Co. Litt. 172, A., and Hargr. note 33; *Rearsby v. Cuffer*, Godb. 219; 1 Ro. Abr. 729; *Enfants C.* pl. 7, 8; *Russel v. Lee*, 1 Lev. 86.

(*z*) *Trueman v. Hurst*, 1 T. R. 40;

Oliver v. Woodroffe, 4 Mees. & W., by Parke, Baron.

(*a*) *Whittingham v. Hill*, Cro. Jac. 494; 1 Ro. Abr. 729; *Enfants C.* pl. 6; *Whywall v. Champion*, 2 Stra. 1083; *Warwick v. Bruce*, 2 M. & Selw. 209; 1 Taunt. 118, S. C. in error.

(*b*) *Crisp v. Churchill*, cited 1 Bos. & Pull. 340.

(*c*) *Lowe v. Griffiths*, 1 Hodges, 30; 1 Scott, 458, S. C.

On a covenant for quiet enjoyment without interruption
 or, or any person deriving(*g*) under him, the declaration
 that one J. S., a third person lawfully claiming a certain
 demised premises, by title derived from the lessor prior to
 's lease, entered by reason of such claim on such part of the
 ut it must not be left a matter of doubt(*h*), whether the per-
 ; might not have entered under title derived from the lessee
 d the name of the person(*i*) who has evicted the plaintiff
 ntioned, as a general allegation that the party deriving un-
 e was evicted will not be sufficient: where a lessee cove-
 xpend £100 in substantial improvements to the dwelling-
 h was demised, under the directions of a surveyor to be
 he lessor(*j*), the appointment of a surveyor is a condition
 o the expenditure, and a declaration cannot be sustained
 averment of such an appointment.

each may be assigned generally in the words of the covenant: the facts (*k*) lie more properly in the defendant's knowledge. In a covenant that the party had lawful authority to grant, the burden may be assigned by alleging (*l*) generally that he had not lawful authority to grant, without stating any eviction or interruption. In an action on a covenant by lessee against lessor, that the lessee should and lawfully enjoy the premises during a certain term of years, and alleging that the lessee entered and was possessed, but was not able to lawfully enjoy, because the lessor entered upon his possession,

(i) **Fraser v. Skey, 2 Chitty's Rep. 646.**

(j) Coombe v. Greene, 11 Mees. & W. 480.

(k) Gale v. Reed, 8 East, 85, by Ld. Ellenborough.

(4) Bradshaw's case, 9 Rep. 60, B.;
Salmon v. Bradshaw, Cro. Jac. 304;

Muscot v. Ballet, Cro. Jac. 369; Glinister v. Audley, Thos. Raym. 14;

Lancashire v. Glover, 2 Show. 460;
Rawlins v. Vincent, Carth. 124.

and expelled and put him out : the lessor by his plea denied the entry and expulsion, and it was decided(*m*) that the breach assigned was not supported by evidence that the lessee went to take possession, and was refused entrance by the lessor, who continued to occupy, and never admitted the tenant : the lessor's covenant might have been broken, either by refusing possession, or turning the lessee out after he had entered ; but as the refusal was not an expulsion either in law or in fact, the evidence did not establish any breach by expulsion. If a covenant to repair embody an exception of reasonable use and wear, the assignment of a breach omitting any notice(*n*) of the exception is demurrable, and if a lease contain a general covenant to repair, and also a distinct covenant to repair *after notice*, and the special covenant to repair after notice is brought forward as a ground for claiming damages, and is not distinguished from the damages claimed by breach of the general covenant, the declaration is liable to a special demurrer, though the defect will be cured by verdict.

31. The breach assigned must not be more extensive than, or vary substantially from the stipulations of the covenant : a party having covenanted to repair all the pales of a garden, except(*o*) those on the west side, a breach assigned generally in not repairing the pales, against the form of the covenant, cannot be supported on demurrer, though sufficient after verdict.

32. A breach, though assigned in the words of a covenant, may be too general(*p*), by not shewing any particular act done, or omitted to be done, constituting a violation of the covenant. A breach assigned in the words of a covenant, which was to cultivate a farm according to the custom of the country(*q*), was held insufficient, in consequence of omitting to allege in what respect the custom was violated : and where specific acts are alleged, it must be shewn by the declaration in what manner such acts(*r*) are connected with the covenant, so as to amount to a breach.

33. The plaintiff should avoid narrowing the breach assigned in his declaration, by the addition of affirmative words : where a breach of covenant was assigned, that the defendant did not use the farm in a hus-

(*m*) Hawkes *v.* Orton, 5 Ad. & Ell. 367 ; 6 Nev. & Mann. 842.

(*n*) Wright *v.* Goddard, 8 Ad. & Ell. 144 ; 3 Nev. & P. 361, S. C. ; Clayton *v.* Kynaston, Salk. 574.

(*o*) Anon. Thos. Jones, 125 ; Rea *v.* Burnis, 2 Lev. 124 ; Com. Dig. Pleader, C. 47.

(*p*) Warne *v.* Bickford, 7 Price, 550 ; Anon. 1 Com. Rep. 228 ; Dickman *v.* Allen, 2 Ventr. 138.

(*q*) Ld. Falmouth *v.* Thomas, 3 Tyrw— 26 ; 1 Cro. & Mees. 89–100, S. C.

(*r*) Pitt *v.* Williams, 2 Ad. & Ell — 419 ; 4 Nev. & M. 412, S. C.

bandlike manner, but on the contrary(*s*) had committed waste, evidence of the defendant's using the farm in an unhusbandlike-manner was rejected, as such acts did not amount to waste. So where a breach is assigned by alleging that the plaintiff could not have, occupy, and enjoy the demised premises(*t*), and then adds, "in this to wit, that the defendant entered upon his possession and expelled him," the plaintiff is confined to the particular breach stated, by the addition of the affirmative words.

34. If the covenant be framed disjunctively, the breach should be assigned in a similar manner. Where, however, a party covenanted to tender a conveyance(*u*) to the plaintiff, his heirs *or assigns*, a breach that the defendant had not tendered a conveyance to the plaintiff, was held sufficient, and a distinction was taken, where a thing was to be done *by* a person, or his assigns, and *to* him, or his assigns; for in the former case it was said the breach should be assigned disjunctively, that the thing was not done *by* the person, or his assigns; but in the latter, it is sufficient to allege that the conveyance was not tendered to the plaintiff himself, for if the interest were assigned, the fact should be shewn by the other side: so in covenant for rent, the breach assigned was(*v*), that the lessee had not paid, without saying "or his assigns," which was held sufficient, as the Court would not presume an assignment.

35. Where the legal interest and cause of action of covenantees in a lease are several, they should sue(*w*) separately, and the several interests, and the several grounds of action should distinctly appear, as in the case of covenants to pay separate rents to tenants in common upon demises by them, or where a person by indenture demises(*x*) Blackacre to A, Whiteacre to B, and Greenacre to C, and covenants with them and each of them, that he had good title, each may maintain an action for his particular damage by a breach of that covenant: if, however, the cause of action be joint, the action(*y*) should be joint, though the interest be several: where, therefore, the covenants in a lease for breach of which the action is brought, are such(*z*) as to give the cove-

(*s*) *Harris v. Mantle*, 3 T. R. 367.

(*t*) *Hawkes v. Orton*, 5 Ad. & Ell. 367-374, by Littledale, J.; *Edge v. Pemberton*, 22 Law J. 48.

(*u*) *Smith v. Sharp*, 1 Salk. 139; 5 Mod. 133, S. C.; *Gyse v. Ellis*, 1 Stra. 228.

(*v*) *Mayor of London v. Tench*, Bull. N.P. 164; *Aleberry v. Walby*, 1 Stra. 229.

(*w*) *Eccleston v. Clipsham*, 1 Saund.

153, and the notes; *James v. Emery*, 8 Taunt. 245; 2 Moore, 195; 5 Price, 529; *Withers v. Bircham*, 3 B. & Cr. 254; 5 D. & Ry. 106.

(*x*) *Slingsby's case*, 5 Rep. 18, B.; *Jenkins Cent.* 262, case 63; *Yate v. Roules*, 1 Bulstr. 25; *Yelv.* 177.

(*y*) *Coryton v. Lithebye*, 2 Saund. 115; *Wilkinson v. Hall*, 1 Bing. N. C. 713; 1 Scott, 675.

(*z*) *Foley v. Addenbrooke*, 3 G. &

nantees a joint interest in the performance of them, a joint act at their suit for breach of any of them ; and if the covenantees jointly(*a*) they are bound to do so. Sir Vicary Gibbs assumes covenants must necessarily be joint or several according to the intention, but the more correct rule is, that by express(*b*) words clearly indicating the intention, a covenant may be joint, or joint and several with the covenantors, or covenantees, notwithstanding(*c*) the interests are several ; and so they may be several although the interest is joint : and if the words are ambiguous, they may be construed according to the interest of the parties appears to be joint or several ; if they are expressly and clearly joint or several, they cannot be trolled.

A distinction is to be observed between an action *by* one of the covenantors, and an action *against* one of several covenantors, for two persons(*d*) covenant jointly and severally with another, the cointenant may support an action against either of the covenantors separately : if, for instance, lands are demised to two persons who covenant jointly and severally to pay rent to the lessor, an action lies against either of them for its non-payment ; and even if the covenant were for the non-joinder of one of the covenantors could only be made the subject of a plea in abatement.

36. There is no general issue in an action of covenant as the plea of *non est factum* only renders it necessary for the plaintiff to prove the execution of the deed ; and matter of defence, or in excuse of non-observance of the covenant, must be specially pleaded : any material variance(*f*) between the deed and declaration, where the declaration does not set out on *oyer*, or a variance between the deed(*g*) as shown in evidence, and the instrument set out on *oyer*, or any erasure, interlineation made in the deed after its execution, or an omission to state a condition(*i*) precedent in the declaration, or any qualification of the contract on which the breach is assigned, affords ground

Dav. 64 ; *Kitchin v. Buckley*, Thos. Raym. 8 ; 1 Lev. 109.

(*a*) *Petrie v. Bury*, 3 B. & Cr. 353 ; 5 D. & Ry. 152, S. C.

(*b*) *Shepp. T. by Preston*, 166 ; *Sorsbie v. Park*, 21 Law Jour. 9 ; *Mills v. Ladbroke*, 8 Jurist, 247.

(*c*) *Robinson v. Walker*, 1 Salk. 393.

(*d*) *Whelpdale's case*, 5 Rep. 119, B. ; *Cabell v. Vaughan*, 1 Saund. 291, B. and the note.

(*e*) 1 Selw. N. P. 525.

(*f*) *Pitt v. Green*, 9 East, 188.

(*g*) *Waugh v. Bussell*, 5 Taunt. 707 ;

1 Marsh. 217.

(*h*) *Cock v. Corwell*, 2 Cr. Rosc. 291 ; 5 Tyrw. 1077, S. C. ; *v. Bateson*, 6 Bing. 110 ; 3 M. 339.

(*i*) *Thomas v. Cadwallader*, 496 ; *Peeters v. Opie*, 2 Saund. n. 3.

(*j*) *Browne v. Knill*, 2 Br. 395 ; 5 Moore, 165 ; *Tempany v. White*, 4 Campb. N. P. C. 20 ; *White*, 12 Ad. & Ell. 668 ; 4 P. 399, S. C.

suit under this issue. A plea of "*non infregit conventionem*," which is merely(*k*) argumentative, or a plea of *riens in arrere* which confesses a breach of the covenant, cannot be sustained on demurrer.

37. In covenant for rent, the defendant may plead that he paid the several gales of rent claimed by the declaration, at the times when they respectively became payable; but payment of any gale of rent after(*l*) it became due, or that the amount was levied by distress, though a good defence to an action of debt, cannot be made available in covenant, because, by these pleas, a breach of the covenant for which damages are claimed is acknowledged: where the rent is paid after the appointed day, accord and satisfaction should be pleaded.

38. It is a general rule of the common law, that an obligation created by an instrument(*m*) under seal, shall only be discharged by an instrument of equal validity: in covenant for non-payment of rent, the defendant pleaded a discharge(*n*) in nature of a release without deed, and the plea was adjudged ill on demurrer: so where a lease contained a proviso that the lessee should not let without leave in writing, on pain of forfeiture, a parol(*o*) license was held insufficient to discharge the lessee from the proviso under seal.

Upon a covenant to repair and maintain all erections and improvements on demised premises, and to surrender and yield up the same, with all such improvements, well and sufficiently repaired, a breach was assigned, alleging the erection of a greenhouse, which was an improvement, on the premises, and its removal before yielding up the premises: the lessee pleaded an assignment by him, and that the lessor agreed with such assignee, that if he erected a greenhouse on the premises he should be at liberty to remove it: after verdict for the defendant, the Court ordered(*p*) judgement to be entered for the plaintiff, because the plea was bad, as setting up a parol agreement to vary a contract under seal: if the plea had amounted to an assertion that the lessor himself had actually occasioned a breach, it might have been deemed a good answer, not on the ground of any agreement between the parties, but as shewing that the breach was the lessor's own act.

(*k*) *Hodgson v. The East India Co.*, 8 T. R. 278; *Taylor v. Needham*, 2 Taunt. 278.

(*l*) *Hare v. Savil*, 1 Brownl. 19; 2 Brownl. 273; *Baden v. Flight*, 3 Bing. N. C. 685; 4 Scott, 412.

(*m*) *Davey v. Prendergrass*, 5 B. & Ald. 187.

(*n*) *Rogers v. Payne*, 2 Wils. 376.

(*o*) *Roe dem. Gregson v. Harrison*, 2

T. R. 425; *Littler v. Holland*, 3 T. R. 592; *Braddick v. Thompson*, 8 East, 344; *Fowell v. Forrest*, 2 Saund. 47, S. n. 1.

(*p*) *West v. Blakeway*, 3 Scott's N. R. 199; 2 M. & Gr. 729, and the Reporter's note; 9 Dowl. Pr. Ca. 846; *Harris v. Goodwyn*, 2 Mann. & Gr. 405; 2 Scott's New Rep. 459.

39. Where a duty accrues by a deed(*q*) in certainty, as by covenant or bond to pay money, there this certain duty takes its essence and operation originally and solely by the writing, and therefore it ought to be avoided by matter of as high a nature, although the duty be merely in the personalty: but where no certain duty accrues by the deed, and a wrong or default subsequent together with the deed, give an action to recover damages, which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea, because it is pleaded only in satisfaction of the damages(*r*), which are demanded by reason of such breach of covenant, and not in discharge of the covenant itself: a covenant to keep premises in repair does not, at the time of executing(*s*) the deed, give the lessor any cause of action, but a wrong or default afterwards in not repairing, together with the deed, gives an action to recover damages for default of reparations.

A plea of accord and satisfaction before(*t*) breach of a covenant, does not afford any defence to an action on the covenant, as that would, in effect, amount to the discharge of a covenant under seal by parol agreement: so where rent is reserved by deed under seal, an agreement for an abatement of the rent can only be made available at law by an instrument under seal for that purpose, and in equity an agreement for the prospective(*u*) abatement of rent reserved by deed must be founded on an instrument in writing executed for adequate consideration. However, as a breach of covenant merely confers a right to recover damages, it may be satisfied without deed, because such satisfaction is only applicable to the damages accrued by the breach, and does not vary or avoid the covenant: executory agreements in writing, not under seal(*v*), may before breach be discharged or abandoned by a subsequent agreement, either verbal or in writing.

40. A plea of accord, in order to constitute a valid defence, must shew(*w*) an accord not merely executory, but which ought to be, and has been executed before action brought. In an action of covenant for not repairing, the defendant pleaded that after covenant broken, an

(*q*) Blake's case, 6 Rep. 43, B.; Rabbetts v. Stoker, 2 Ro. Rep. 187; Palm. 110, S. C.; Bulteel v. Jarrold, 8 Price, 467.

(*r*) Alden v. Blague, Cro. Jac. 99; Noy. 110.

(*s*) Blake's case, 6 Rep. 44, A.

(*t*) Kaye v. Waghorn, 1 Taunt. 428; Lowe v. Eginton, 7 Price, 604; Snow v. Franklin, 1 Lutw. 359; Com. Dig. Accord. A. 2.

(*u*) Fitzgerald v. Lord Portarlington, 1 Jones's Exch. Rep. 431.

(*v*) Longden v. Stokes, Cro. Car. 383; Edwards v. Weeks, 1 Mod. 262; 2 Mod. 259; 1 Freem. 230.

(*w*) Peytoe's case, 9 Rep. 77, B.; Balston v. Baxter, Cro. Eliz. 304; Russell v. Russell, 3 Lev. 189; Allen v. Harris, 1 Ld. Raym. 122; 2 Lutw. 1537; Lynn v. Bruce, 2 H. Bla. 317; James David, 5 T. R. 141.

nt was entered into between(x) the parties, that in considera-
defendant had become tenant of the premises at a certain rent,
promised, at the plaintiff's request, to repair the premises,
e 12th of April then next, the plaintiff agreed to allow time
t day for making such repairs, without bringing any action,
the plaintiff commenced his action before the time specified :
dict for the defendant, the Court held the plea was bad, and
udgement to be entered for the plaintiff.

it must also appear by the plea, that the satisfaction is ade-
a covenant for not repairing, a plea of an agreement(y)
the parties, that the defendant should employ a workman
four days in repairing the house, which should be a sufficient
on, and that the defendant employed a workman accordingly :
lict for the defendant, the judgement was arrested, the plea
emed insufficient, as the defendant was bound to do the re-
the original covenant. In covenant for rent, a plea that the
er the rent-day paid the landlord a lesser sum than was due,
accepted(z) in full discharge and satisfaction of the entire
rear, cannot be sustained, because payment of a lesser sum of
no satisfaction(a) of a larger sum, but if the lessor accept
ie rent in arrear, and make an acquittance under seal in sa-
of the whole sum due, the deed operates as a competent dis-

The plea must also shew that the accord was certain : in co-
r not repairing, the defendant pleaded an agreement(b) that
d give up possession of the demised premises to the plaintiff,
nsideration thereof, the plaintiff agreed to discharge the breach,
is averred, that in pursuance of the agreement, and within five
t afterwards, the defendant gave up the possession ; the plea
bad on demurrer, because the agreement did not fix any
leaving ; but if the agreement had been to quit on a specified
had been, strictly observed, it would have afforded a good de-

Eviction by the lessor, either from the whole or from(c) any
emised premises, causes a suspension of the whole rent, so
he tenant is wrongfully deprived of the possession : but a par-

ley v. Homan, 3 Bing. N. C.

(a) Co. Litt. 212, B.

ms v. Tapling, 4 Mod. 88.

(b) Samford v. Cutcliffe, Yelv. 124.

h v. Sutton, 5 East, 230 ;

(c) Salmon v. Smith, 1 Saund. 204,

letcher, 10 Ad. & Ell. 121 ;

note 2 ; and see title, Replevin, ante,

r. 292, S. C.

No. 68, p. 867.

tial eviction either by the lessor, or by a stranger, is not a sufficient plea to an action of covenant for not repairing, or for recovery of damages, unless it be averred that the tenant is kept out of the part of the premises on which the repairs are required to be made, or in respect of which the damages are sought. If any act by the lessor amounting to an entry on demised premises, and expulsion of the tenant, though the lessor depart(e) immediately, sufficient possession is *in him* to suspend the rent, and will support an averment of his *holding out* the tenant until some act shall be done by the tenant amounting to a re-entry, by means of which the rent may be revived. Where part of the premises is evicted by title party, the lessor cannot, in this form of action(f), recover from the lessor the portion of the rent subsequently falling due, because the action is between the original parties is wholly personal, as it depends entirely on the privity of contract, but the lessor is entitled, by action of covenant, to recover a proportionable part of the rent from the assignee of the premises for the part of the premises of which possession is retained, because the assignee is chargeable in respect of privity of estate.

43. A plea by the lessee, denying that his lessor(g) had a legal estate in the demised premises cannot be supported, being equivalent to "*nil habuit*;" but if the plaintiff claim as heir, or assignee of the lessor, the defendant may traverse(h) the title derived from the lessor, or deny that the lessor had such an estate(i) as could be claimed by the assignee, or the defendant by his plea may shew that at the time the lessor had some legal estate in the premises at the time of making the demise, yet that such estate(j) had determined, and the lessor during the term(k) had conveyed away his reversion in the premises.

44. A set-off may be pleaded in covenant for rent, but as there is no general issue in this form of action, a notice of set-off must be served.

(d) *Newton v. Allin*, 1 Gale & Dav. 44; 1 Q. B. Rep. 518, S. C.; *Hodgskin v. Queenborough*, Willes, 129; *Snelling v. Stagg*, Bull. N. P. 165; *Carrell v. Read*, Owen, 65; *Moor*, 404, S. C.

(e) *Cibel v. Hill*, 1 Leon. 110; and see *Palmer v. Gooden*, 8 Mees. & W. 890; 7 Mees. & W. 486.

(f) *Stevenson v. Lambard*, 2 East, 575.

(g) *Walton v. Waterhouse*, 2 Saund. 418, note 1.

(h) *Carvick v. Blagrave*, 1 Brod. &

B. 531; 4 Moore, 303; *Warren v. Ivie*, 1 Jones's Exch. Rep. 329.

(i) *Brudnell v. Roberts*, 2 V. & B. 487; *Blake v. Foster*, 8 T. R. 487; *Saunders*, 4 B. & Cress. 529, 2 Bing. 112; 9 Moore, 238.

(j) *England dem. Syburn v. T. R.* 682; *Doe dem. Jackson* bottom, 3 M. & Selw. 516.

(k) *Doe dem. Marriott v. E. B. & Adol.* 1065; 3 Nev. & Doe *dem. Lowden v. Thompson* N. P. C. 230.

is not applicable, and may(*l*) be disregarded: unliquidated arising from a breach by the plaintiff of other covenants(*m*) lease, cannot be made the subject of set-off, nor will a plea be admissible in an(*n*) action of covenant for unliquidated s.

If a person by deed(*o*) covenant to build a house, or convey an and before the covenant broken, the covenantee releases to him ms, suits, and quarrels, this does not discharge the covenant because at the time of the release there was no debt, duty, or of action in existence: but a release under seal of all cove- a good discharge(*p*) of the covenant before it be broken. In n for recovery of a year's rent due at Lady-day, 1689, the de- pleaded a release of all demands, dated in November, 1688, and ent was given(*q*) for the plaintiff on demurrer, because, though half-year's rent, which was a duty demandable, was released, second half-year's rent not being due when the release was exe- as not discharged. Where the covenants of which a breach is l are in the affirmative, a general plea of performance is suffi- ut such plea(*r*) must aver performance in the terms of the cove- any of the covenants be in the negative, a special answer must ven in the negative, or if any of them be framed disjunctively, a must state(*t*) which branch of the covenant has been per-

ovenant for non-payment of rent, it was ruled(*u*) that the de- might plead tender of the amount at any time before action , but this position has been disputed, as, it is said, that nothing charge a covenant to pay on a certain(*v*) day, but actual pay- tender on that day. However, by the Irish Statute(*w*), 3 & 4 105, s. 46, a defendant by leave of a judge of any of the supe-

lenshaw v. Thompson, 5 M. & t.
owlett v. Strickland, Cowp. 56;
v. Waters, 6 T. R. 488.
oper v. Robinson, 2 Chitty's
; and see title, Replevin, ante,
n. 866.
. Litt. 292, B.; Hoe's case, 5
B.; Thorpe v. Thorpe, 1 Ld.
15 and 662; 1 Salk. 171, S. C.
incock v. Field, Cro. Jac. 170;
r. 407, Release, U. pl. 21.
phens v. Snow, 2 Salk. 578;
Hanson, 1 Lev. 99; Ingram v.
ev. 210; Tothil v. Ingram, 1

Ventr. 314, S. C.

(*r*) Scudamore v. Stratton, 1 Bos. & P. 455.

(*s*) Cutler v. Southern, 1 Saund. 117, note 1; Co. Litt. 303, B.; Fines v. Dell, Style, 163.

(*t*) Duke of Bolton v. Clarke, 1 Lutw. 581; Co. Litt. 303.

(*u*) Johnson v. Clay, 7 Taunt. 486; 1 B. Moore, 200; Birks v. Trippet, 1 Saund. 33, B., n. 2 and D.

(*v*) Poole v. Tumbidge, 2 Mees. & W. 223.

(*w*) 3 & 4 Vict. c. 105, s. 46, Irish; 3 & 4 Will. IV. c. 42, s. 21, English.

rior courts, is entitled to pay into court a sum of money by way of compensation or amends, under such regulations as to payment of costs, and the form of pleading, as the judges shall direct. The defendant may plead that he was an infant at the time of entering into the covenant, as a party cannot be bound by any covenant entered into by him during his minority.

(x) 10 Com. Dig. Infant, C. 2; *Gylbert v. Fletcher*, Cro. Car. 179.

CHAPTER XI.

USE AND OCCUPATION.

1. *Action for Use and Occupation at common Law.*
2. — *by Statute 23 & 24 Geo. III. c. 46.*
3. *Operation of Statute of Frauds on verbal Demises not exceeding three Years.*
4. *Use and Occupation does not lie on unwritten Contracts, unless Possession taken.*
5. *Under verbal Demise from Year to Year, Stipulations respecting Management may be enforced.*
6. *Nature of Relation which must subsist between the Parties, in order to sustain the Action.*
7. *Tenant continues liable until Possession restored.*
8. *Action does not lie, where Landlord's default or misconduct justifies his Tenant in quitting.*
9. *Entry by one Executor does not render his co-Executor personally liable in this Form of Action.*
10. *How v. Kennett, 3 Ad. & Ellis, 659.*
11. *Assignees of Bankrupt only liable during their Occupation.*
12. *When maintainable for Occupation of Premises during part of a Gale.*
13. *Payment of Rent accruing after Expiration of Holding, conclusive Evidence of continuing Tenancy.*
14. *Usage in respect of Lodgings.*
15. *Surrender by Act and Operation of Law.*
16. *Occupier not answerable where Possession taken through Fraud or Misrepresentation.*

1. LEASES by *parol*, or by instruments not under seal, according to principles of the common law, were deemed *real* contracts, and the appropriate remedies for recovery of rents reserved, or payable under *h demises*, were the action of debt(*a*), and the proceeding by *disseisin*, but the action of *assumpsit* was considered wholly inapplicable to *realty*, or to rent arising out of land: a defendant had a right to *wage law* in actions of debt on simple contract, and during the reign of Queen Elizabeth various unsuccessful attempts were made to enforce payment of rent due by simple contract, by means of the action(*b*) of *assumpsit*, in which the wager of law was not allowed: it was at length decided, in the reign of Charles the First, that an *express*(*c*) promise to pay rent, in consideration of the use and occupation of demised premises, was sufficient to support an *assumpsit*, although a *parol* demise

(a) Green v. Harrington, 1 Brownl. 14; Hob. 284; Hutt. 34; Reade v. Brown, 1 Leon. 155; Cro. Eliz. 242; Cock v. Payne, Cro. El. 786; Clerk v. Lady, Cro. El. 859; 1 Ro. Abr. 7, on sur case O. plac. 1 and 2; fo. 8, l. 5.

(b) Acton v. Symon, Cro. Car. 415; Jones, 364; Wybrants v. Tallon,

Vern. & Scr. 276.

(c) Dartnall v. Morgan, Cro. Jac. 598; Potter v. Fletcher, 1 Ro. Abr. 8, Action sur case O. pl. 8; Lance v. Blackmore, Style, 463; Anon. Style, 400; Chapman v. Southwicke, 1 Lev. 204; 1 Siderf. 323; Johnson v. May, 3 Lev. 150; Trevor v. Roberts, Hardr. 366.

at a fixed rent were proved on the trial, but it was agreed that in cases the law would not raise any promise by implication : the promise was considered as matter collateral to the *real* contract, the nature of a special agreement to pay a stipulated sum of money for the enjoyment of the premises, and such express promise was required to be made(*d*) *at the same time* as the demise, for otherwise the taking to pay the rent would be invalid for want of consideration. Before the passing of the Act which gives the action for use and occupation generally, proof of an actual demise at a fixed rent was fatal in an action of debt or of *assumpsit* for use and occupation either because it shewed the existence of a *real* contract, or because the demise having passed an interest, the tenant could not be considered as holding by the lessor's permission.

However, where a tenant held lands without any stipulation as to fixed rent, a reasonable compensation was allowed to be recovered in an action of *assumpsit* for the enjoyment of the premises, as an action of debt would not lie where no rent was ascertained, and a proper payment(*e*) was therefore implied by law for so much as the occupation was reasonably worth, the Court apparently treating the contract between the parties as an agreement, and not as an actual lease, so not concerning the realty.

2. In order to obviate the difficulties which occurred in the recovery of rents, where the premises were not demised by deed, enacted by the Irish Statute(*g*), 23 & 24 Geo. III. c. 46, that it should be lawful for every landlord(*h*), where the agreement was not by deed, to recover a reasonable satisfaction for the lands, tenements, hereditaments, or premises held(*i*) or occupied by the defendant or defendant's ancestor in an action on the case for the use and occupation of the premises held and enjoyed ; and if, in evidence on the trial of such action, no *parol* demise or agreement, not being by deed, whereon a certain rent was reserved, should appear, the plaintiff in such action should nevertheless be nonsuited, but might make use thereof in evidence to show the *quantum* of the damages to be recovered.

Demises by deed are excepted out of this Statute, but where premises are holden under an indenture containing an equitable or

(*d*) Bull. N. P. 138.

(*e*) *Mason v. Welland*, Skinn. 238—242; *How v. Norton*, 1 Sid. 279; 1 Lev. 179.

(*f*) *Gibson v. Kirk*, 1 Gale & Dav. 252; 1 Q. B. Rep. 850, S. C.

(*g*) 23 & 24 Geo. III. c. 46, s. 3, Ir. ;

11 Geo. II. c. 19, s. 14, English.

(*h*) See *Dolby v. Iles*, 11 Ad. 338.

(*i*) *Pinero v. Judson*, 6 Bing. Tindal, Ch. J. ; *Izon v. Gorton*, N. C. 507.

tory agreement for a lease, without any actual(*j*) demise, or any covenant(*k*) to pay rent, the action for use and occupation may be maintained. Prior to this enactment, an action of debt for use and occupation *generally* could not have been supported, as it was requisite the declaration should set forth the particulars of the demise, the entry of the lessee, and the time when the rent became due, but after(*l*) it was settled that debt would lie for use and occupation, it followed from the decision, that the *generality* of the form(*m*) of declaring in debt for use and occupation might, in every respect, be adopted, and that the terms of the demise might be used as evidence of the amount of damages: the action of *assumpsit* for use and occupation was not introduced by this Act, but was extended to cases in which there was an express demise at a certain rent, if not under seal.

3. All interests in land created without any instrument in writing, are rendered void by the Statute of Frauds(*n*), except demises for a period not exceeding three years, which are executed(*o*) in possession, and on which the rent reserved amounts at least to two-third parts of the improved value; and under a verbal agreement for an interest in land, not reduced into writing, even for a less period than three years, no action for damages lies against the lessor(*p*) for not giving possession, nor against the lessee for not entering into or accepting the possession, nor can an action for use and occupation, or of *assumpsit*, be maintained, unless there be a part execution of the contract by the entry of the tenant into possession, because it is expressly provided by the second section(*q*) of the Statute, that no action shall be brought, whereby to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement, or some note thereof, shall be in writing, and signed by the party to be charged. If a verbal demise be made for three years, or for a shorter period, to commence *in præsentia*, or for two years, to commence at the end of a month, and the lessee enter, the demise will be binding for the stipu-

(*j*) Elliott *v.* Rogers, 4 Espin. N.P. C. 59.

(*k*) Banister *v.* Usborne, 2 Peake's N.P. C. 76.

(*l*) Stroud *v.* Rogers, 6 T. R. 63, in the note; Wilkins *v.* Wingate, 6 T. R. 63; and see Egler *v.* Marsden, 5 Taunt. 25.

(*m*) King *v.* Fraser, 6 East, 548; Gibson *v.* Kirk, 1 Gale & Dav. 252; 1 Q. B. Rep. 850, S. C.

(*n*) 7 Will. IV. c. 12, s. 1, Irish; 29 Car. II. c. 3, ss. 1 and 2, English.

(*o*) Inman *v.* Stamp, 1 Stark. N.P. C. 12; 2 Selw. N. P. 844.

(*p*) Edge *v.* Strafford, 1 Cro. & J. 391; 1 Tyrw. 293; Inman *v.* Stamp, 1 Stark. N. P. C. 12; Jones *v.* Reynolds, 4 Add. & Ell. 805; 6 Nev. & M. 441; 7 Carr. & P. 335; Woolley *v.* Watling, 7 Carr. & P. 610; 1 Sugd. Vend. 136; and see De Medina *v.* Polson, Holt's N. P. C. 47.

(*q*) 7 Will. III. c. 12, s. 2, Irish; 29 Car. II. c. 3, s. 4, English.

lated period, but such a parol agreement may be rescinded by either party, before it has been actually executed in possession, and an executory contract cannot be enforced on either side, it is either void(*r*) as a contract, though capable of having some operation in communicating a license, which would, however, be counterproductive.

4. Where a verbal agreement was made on the 12th of January for the hire of furnished lodgings from the 25th of the same month for two or three years, at a weekly rent of forty shillings, which was two-thirds of their value, but possession was never accepted, it was ruled that such an agreement was a contract for an interest in land, which before it was executed in possession did not confer any right to sue the lessee for use and occupation, nor for damages in respect of the acceptance of the possession, because before entry the defendant was only entitled to an *interesse termini*, which never took effect as a lease.

5. On a parol letting of a farm made the 16th of December to commence on the ensuing Lady-day, for one year, and so from year to year, subject to certain stipulations for the management of the premises contained in an unsigned document, it was decided(*t*) that though the performance of the agreement could not be enforced until it remained executory, yet where an actual demise by parol took place which was valid under the Statute of Frauds, and a tenancy was actually created by entry and payment of rent, that the terms of the agreement might be proved by parol testimony, and might be as specific as if they were comprised in an instrument signed by the parties.

6. A landlord suing for rent must proceed either upon a contract made with his tenant, or upon a contract(*u*) which will imply from the relation subsisting between them, or an occupancy may be shewn by the defendant, and title(*v*) proved in the case. In order to support this action, it is necessary that the land should have been occupied(*w*) or holden(*x*) by the defendant, his agent

(*r*) *Carrington v. Roots*, 2 Mees. & W. 248-257, by Parke, Baron.

(*s*) *Edge v. Strafford*, 1 Cro. & Jerv. 311; 1 Tyrw. 293; *Woolley v. Watling*, 7 Carr. & P. 610.

(*t*) *Lord Bolton v. Tomlin*, 5 Ad. & Ell. 856; 1 Nev. & P. 247.

(*u*) *Hall v. Burgess*, 5 B. & Cr. 332, by Bayley, J.; 8 D. & Ry. 67; *Strahan v. Smith*, 4 Bing. 94; 12 Moo. 289; *Clarke v. Webb*, 4 Tyrw. 673; 1 Cro. M. & Rosc. 29.

(*v*) See *Buckworth v. Simpson*, 5 Tyr. 344; 1 Cro. M. & Rosc. 834. *Patteson*,

J., says, that use and occupancy arise from waiver of a tort, as in the case of simply letting into possession the Imperial Gas Light Co., 6 Q. B. 854; *Ibbs v. Richardson*, 9 Q. B. 853.

(*w*) *Nation v. Tozer*, 4 Ty. & Cr. M. & R. 175.

(*x*) *Pinero v. Judson*, 6 Q. B. 3 Moo. & P. 407; *Smith v. Mann*, 4 Gr. 841; 3 Sc. & L. 1; *Conolly v. Baxter*, 2 Stark 525; *Bull v. Sibbs*, 8 T. R.

tenants, during the time for which compensation is claimed, though it need not have been beneficially or even actually so enjoyed, provided the defendant has taken possession, and continues to have the right of actual occupation, or has an opportunity of occupying whenever he pleases.

7. If premises are occupied on the expiration of a lease by an under-tenant, the original lessee(*y*) continues liable in an action for use and occupation, until the absolute possession be restored, for otherwise the landlord would incur the risk of having a pauper put into possession: it may be shewn that the landlord recognized or accepted(*z*) the under-tenant as his immediate tenant, but the mere fact of an overholding by such undertenant, though coupled(*a*) with payment of rent by him for the period of occupation, does not raise any presumption of a demise by the reversioner, unless something occurs to shew the existence of a new contract; it is not settled whether in the case of a lease granted to two parties, one of whom is desirous to give up possession, and notifies his desire to the other, who nevertheless holds over(*b*), the party who is out of possession can be made liable in an action for use and occupation.

A tenant holding by lease for a term having underlet the demised premises, his undertenant held over for part of a year, after the expiration of the demise, against the will of the lessee, by reason of which the lessee was unable to restore the possession to his lessor, and it was ruled(*c*) that the lessee was liable to make compensation for the time during which his undertenant overheld, though not for a whole year's rent, but if the expired tenancy had been a holding from year to year, the immediate lessee would have been answerable for the full year's rent. A party entitled under an executory agreement for a lease having procured attornments from some of the occupying tenants, and collected some of the rents, before any lease was executed, it was ruled he(*d*) was liable in an action for use and occupation, because the occupation of tenants, whom a person agrees to receive as his tenants, is the occupation of the party himself.

A tenant from year to year continues liable in an action for use

(*y*) *Christy v. Tancred*, 7 Mees. & W. 127; 9 Mees. & W. 438; *Harding v. Crethorn*, 1 Espin. N. P. C. 57; *Roe v. Wigga*, 2 New Rep. 330.

(*z*) *Harding v. Crethorn*, 1 Espin. N. P. C. 57.

(*a*) *Waring v. King*, 8 Mees. & W. 571.

(*b*) *Christy v. Tancred*, 9 Mees. & W. 438-448.

(*c*) *Ibbs v. Richardson*, 9 Ad. & Ell. 849; 1 P. & Dav. 618.

(*d*) *Neale v. Swind.* 2 Cro. & Jerv. 377; *Neale v. Sweeny*, 2 Tyrw. 464, S. C.

and occupation until his holding(*e*) is determined, either by quit, the expiration of the contract, the substitution(*f*) of a tenant, the eviction of the interest, or the assignment or determination of the lessor's estate, as a yearly tenancy once created is presumed to continue unless the tenant by legal means becomes exonerated from his liability. A tenant having quitted apartments without notice, it was ruled(*g*) that the landlord, by endeavouring to let the premises, and putting up a board for that purpose, did not afford any defence to the action, nor will a mere reletting of premises by the landlord to a third person, *with the tenant's consent*, constitute a new tenancy by act and operation of law, unless there be a change of possession by the introduction of such new tenant. However, where a tenant agreed to take a house at a certain rent, and put up a board for the purpose of underletting the premises, such evidence of occupation was considered sufficient to charge him with the rent.

8. If a landlord confer an actual holding, with power to use and enjoy, so far as depends on him, the action is maintainable against a tenant who occupied the second floor of a warehouse, which was destroyed by accidental fire, was held liable in an action for use and occupation, to pay rent for the premises during the period which elapsed between the fire(*k*) and the regular determination of the tenancy, if nothing was done by the lessor to deprive the tenant of his use and enjoyment: the tenant is only entitled to withdraw him from the tenancy, and to refuse(*l*) payment of his rent, where there is an error or fraudulent misdescription of the demised premises, the premises are found to be uninhabitable by means of the act or default of the landlord himself. It was held by Lord Abinger that a person who lets a furnished house, does so under an implied

(*e*) *Matthews v. Sawell*, 8 Taunt. 270; 2 Moore, 202; *Graham v. Whichelo*, 1 Cro. & M. 188; 3 Tyrw. 201; *Harland v. Bromley*, 1 Stark. N.P. C. 455; *Bull v. Sibbs*, 8 T. R. 327.

(*f*) *Walls v. Atcheson*, 3 Bing. 462; 11 Moore, 379; *Hall v. Burgess*, 5 B. & Cress. 332; 1 D. & Ry. 67; *Woodcock v. Nuth*, 8 Bing. 170; 1 M. & Sc. 317; *Reeve v. Bird*, 4 Tyrw. 612; 1 Cro. M. & Rosc. 31; *Stone v. Whiting*, 2 Stark. N. P. C. 235.

(*g*) *Redpath v. Roberts*, 3 Espin. N. P. C. 225; *Griffith v. Hodges*, 1 Carr. & P. 426.

(*h*) *Doe dem. Huddleston v. Johnston*, M'C. & Y. 141.

(*i*) *Sullivan v. Jones*, 3 C. & D. 579.

(*k*) *Izon v. Gorton*, 5 Bi. 501; 7 Scott, 537, S. C.; *Holtzapfel*, 4 Taunt. 45; *Gibbins*, 1 Q. B. Rep. 421; Dav. 10, S. C.

(*l*) *Izon v. Gorton*, 5 Bi. 507; 7 Scott, 537; *Arden v. Mees. & W.* 321.

(*m*) *Smith v. Marrable*, 1 W. 5; 1 Carr. & M. 479; 1 Etherington, Ry. & M. 268; 117; *Collins v. Barrow*, 1 N. 112; *Cowie v. Goodwin*, 9 378.

gation, that it is in a fit state to be inhabited, and it was ruled that the existence of a nuisance of such a nature that no person could reasonably be expected to live in the house, justified a tenant in quitting without notice, and afforded a valid defence to an action for use and occupation of the premises. Under an agreement in writing to take a certain number of acres of eatage for cattle for six months at a specified rent, after the tenant put in his cattle he discovered that the land was strewed with lumps(*n*) of refuse paint, by which several head of cattle were poisoned, and in an action for use and occupation, it was ruled that the defendant was not discharged from his obligation to pay the reserved rent, as it was not shewn that the landlord was aware of the paint being on the land, and that there was no contract implied by law in the case of a farming lease, that the premises were to be reasonably fit for the purpose for which they were taken. It is difficult to suggest a stronger case for discharging an occupier from liability under his contract in an action for use and occupation, than where a deleterious substance, not only injurious to vegetation, but destructive to cattle, is strewed over pasture land. In an action of debt for rent on a demise of a house and garden with the use of fixtures for three years, the defendant pleaded that the house was demised(*o*) for the purpose of habitation, and that he was obliged to quit on the day after he got possession, in consequence of the house being so infested with bugs as to be unfit for dwelling in it; and after verdict for the defendant, the Court ordered judgement to be entered for the plaintiff, because no answer to the action was disclosed by the plea.

Where a tenant took a dwelling-house for three years, and stipulated to keep it in as good repair as it then was, fair wear and tear excepted, although the house became uninhabitable in consequence(*p*) of defects in the building, it was ruled, that as the injury was not occasioned by the landlord's default, the tenant was liable for the rent during the term, and that the landlord in such a case is under no implied obligation to repair. If there be an actual demise, the tenant is liable for the rent reserved, notwithstanding the destruction of the premises by accidental fire, but if there be no express demise, he is liable for the time(*q*) during which the premises were actually occupied, as the compensation due for use and occupation accrues *de die in diem*. If a landlord by his misconduct justify the tenant in an abrupt departure

(*n*) Sutton *v.* Temple, 7 Jurist, 1065.
 (*o*) Hart *v.* Windsor, 8 Jurist, 150;
 overruling Smith *v.* Marrable, 11 Mees.
 & W. 5.

(*p*) Arden *v.* Pullen, 10 Mees. & W.
 321.

(*q*) Packer *v.* Gibbins, 1 Gale & Dav.
 10; 1 Q. B. Rep. 423, by Patteson, J.

during a tenancy limited to a specific period, and to be compensated by a fixed sum, he can neither recover(*r*) the whole rent under the original contract, nor insist, as in an ordinary tenancy, upon the want of notice: but if the landlord has been paid a sum of money for the actual occupation, the tenant cannot recover it back; and if the tenant remain in occupation for any time after the landlord's misconduct, the landlord will be entitled to recover whatever a jury may think such occupation to be worth.

9. Two persons having acted as executors of a deceased tenant for years, and one of them alone having entered into possession of the chattel interest, in an action for use and occupation against both executors, it was decided(*s*) that the entry by one executor did not enure as the entry of his co-executor, so as to render him who had never entered personally liable in this form of action, although both executors might have been liable in their own right, even without entry by either, to an action of debt for rent accruing due after the testator's death, because the term vested in both by operation of law, and after taking upon themselves the executorship, neither could waive the term which the liability to pay rent was incident.

10. A tenant from year to year being involved in pecuniary difficulties, assigned his property for the benefit of his creditors to trustees who entered on the demised premises for the purpose of disposing of the stock in trade belonging to the insolvent; the trustees paid the landlord a quarter's rent out of the produce of the sale, and then refused to give him up the keys of the house: in an action for use and occupation against the trustees for a subsequent quarter's rent, it was decided that they were not answerable, unless it were proved that they had *actually occupied as tenants*, and the Court held that the question had been properly submitted to the jury, whether the acts of the trustees shewed any intention on their part to become tenants of the premises; and although an action of debt might lie against them upon the assignment of the interest, yet an action for use and occupation could not be supported, unless it were shewn they had in fact occupied.

11. Under this Statute(*u*), a landlord, to whom rent is due, is

(*r*) *Kirkman v. Jervis*, 7 Dowl. Pr. Ca. 678; and see *Meehelen v. Wallace*, 7 Ad. & Ell. 54, note; 6 Nev. & M. 316.

(*s*) *Nation v. Tozer*, 4 Tyrw. 561; 1 Cro. M. & Rosc. 172, S. C.; and see *Green v. Ld. Listowell*, 2 Irish Law Rep. 384; *Wollaston v. Hakewill*, 3

Mann. & Gr. 297; 3 Scott's N. R. 593, S. C.

(*t*) *How v. Kennett*, 3 Ad. & Ell. 659; 5 Nev. & M. 391; *Carter v. Warne*, Moo. & Malk. 479; *Clarke v. Webb*, 4 Tyrw. 673; 1 Cro. M. & R. 11.

(*u*) 23 & 24 Geo. III. c. 4, s. 3, Irish; 11 Geo. II. c. 19, s. 14, English.

lowed to recover, not the rent, but an equivalent for the rent, or reasonable satisfaction for the use and occupation of premises enjoyed or holden under the demise, but it is not within the scope of the Act to make the remedy by action for use and occupation co-extensive with all the remedies for recovery of rents claimed to be due by mere force of the contract for rent: it was only meant to provide an easy remedy for the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. Under an agreement to pay an *annual* rent, a bankrupt occupied the demised premises for part of the year, and his assignees for the remainder of the year, until the rent became due, and it was ruled^(v), that although the assignees might have been liable in an action of debt for the whole year's rent, which fell due after the assignment, yet in an action for use and occupation they were only answerable for rent during the period of their occupation. In a subsequent case, however, assignees were held liable for the antecedent occupation^(w) of the bankrupt during the gale in which they entered, because the rent falling due on specific gale-days, and the assignees being in possession when the gale-day arrived, it was considered they were answerable for the full quarter's rent. The principles laid down in *Naish v. Tatlock*^(x), have been recognized and adopted by several late decisions, and may be considered as well-established. A *feme sole* who occupied a house as a yearly tenant, gave notice at Lady-day^(y) she would quit at the ensuing Michaelmas: having married during the current half-year, she quitted the house in June, and it was ruled that her husband *alone* was not answerable in an action for use and occupation, for the half-year's rent which fell due at the end of the half-year during which the marriage took place: and it was observed by Richardson, J., if the wife had sold her interest on the day she married, an action would not lie against the vendee for her occupation, as he would have been a stranger, and the husband was equally a stranger to her occupation.

12. An action for use and occupation does not lie for the enjoyment of premises during part of a gale, if the contract be put an end to^(z) before the gale-day arrives, and the landlord accept possession, for if there be an actual demise and an express reservation, the rent

^(v) *Naish v. Tatlock*, 2 H. Bla. 319; *Nation v. Tozer*, 4 Tyrw. 561; 1 Cro. M. & Rosc. 172; *How v. Kennett*, 3 Ad. & Ell. 659; 5 Nev. & M. 391, S. C.

^(w) *Gibson v. Courthope*, 1 Dowl. & Ry. 205.

^(x) *Naish v. Tatlock*, 2 H. Bla. 319;

Nation v. Tozer, 4 Tyrw. 561; 1 Cro. M. & Rosc. 172.

^(y) *Richardson v. Hall*, 1 Brod. & B. 50; 3 Moore, 307; and see *Keating v. Bulkeley*, 2 Stark. N. P. C. 419.

^(z) *Grimman v. Legge*, 8 B. & Cress. 324; 2 Mann. & Ry. 438, S. C.

accrues on the day named in the reservation, and on no other day, though, if there be no demise, and an action be brought merely for use and occupation, then the compensation for such occupation accrues from day to day, like interest. A lessee under a contract not in writing, reserving rent payable half-yearly on the 6th of April and 6th of October, became bankrupt(*a*), and a fiat issued against him in March, all rent due up to the previous October having been paid: the assignee refused to accept the lease, and the bankrupt having offered within fourteen days afterwards, and only one day before the 6th of April, to give up possession to the landlord, it was ruled that the bankrupt lessee was not liable under the Bankrupt Act(*b*), in an action for use and occupation, to make compensation in respect of the period of his being in possession after the 6th of October, as the bankrupt is relieved by the Statute from all rent accruing after the date of the commission, in case he delivers up the lease or agreement to the lessor within fourteen days after notice of the refusal of his assignees to accept the lease: it was also ruled that this clause of the Act extends to the case of an *unwritten* demise, and that the offer(*c*) to deliver possession in such case is equivalent to a delivery of a lease or agreement.

13. A tenant of a dwelling-house, on the expiration of his lease at Midsummer, refused to give up possession, insisting upon notice to quit, and continued to hold until the following Christmas, when he tendered the keys to his landlord, and afterwards paid all the rent then due. Lord Tenterden, C. J., left a question to the jury(*d*), whether a new agreement for a tenancy was to be inferred from the circumstances, or whether the party was merely an overholding tenant: after verdict for the defendant, a new trial was granted, because the payment of a year's rent, which became due after the expiration of the lease, afforded conclusive evidence of the creation of a new tenancy, which the landlord could only have put an end to by notice to quit, and could not be determined by the tenant without a similar notice, and the lessor was therefore, entitled, in an action for use and occupation, to recover the half-year's rent due at Lady-day ensuing. However, in a subsequent case, where a tenant, after the expiration of his lease(*e*), continued possession, and paid rent at the same rate for the following quarter

(*a*) *Slack v. Sharpe*, 8 Ad. & Ell. 366; 3 Nev. & P. 390, S. C.

(*b*) 6 Geo. IV. c. 16, s. 75, English; 6 & 7 Will. IV. c. 14, s. 89, Irish.

(*c*) *Slack v. Sharpe*, 8 Ad. & Ell. 372, by Ld. Denman, Ch. J.; but see *Briggs v. Sowry*, 8 Mees. & W. 729-

739.

(*d*) *Bishop v. Howard*, 2 B. & Cr. 100; 3 D. & Ry. 295; *Sauvage v. puis*, 3 Taunt. 410.

(*e*) *Freeman v. Jewry*, Moody & M. 19; and see *Woodcock v. Nuth*, 8 E. 170; 1 Moo. & Sc. 317, S. C.

the precise quarter-day, and then claimed to give up possession : in an action for use and occupation Lord Tenterden held that such payment of rent afforded no evidence of a new continuing tenancy, being equally applicable to a new agreement for the quarter, as to a new yearly holding.

14. According to ordinary usage, lodgings are seldom taken for so long a period as a year, and where a tenant quitted furnished apartments at the end of the first year of his tenancy, it was ruled(*f*) that proof of a general occupation at a yearly rent did not raise any presumption of a yearly tenancy. A person hiring lodgings by the month or by the week, if he enter upon a fresh month or a fresh week, will become(*g*) subject to rent for such new period, because the tenancy can only be put an end to on the expiration of the month or of the week, but a previous notice of quitting, in the absence of any usage or agreement to that effect, cannot be implied as part of the contract.

15. An assignment(*h*) by parol, or a surrender(*i*) by parol, without writing, of a yearly holding, is absolutely void by the provisions of the Statute of Frauds, but if the landlord accept(*j*) possession of the demised premises from his tenant, and agree to relinquish any claim for further rent, or if both landlord and tenant agree to the substitution(*k*) of another tenant, who enters and becomes liable for payment of the rent, such acceptance of possession, or substitution of another tenant, has the effect of discharging the original tenant from any rent subsequently accruing due.

A yearly tenant, who leaves demised premises in pursuance of a verbal license from the landlord for that purpose, and without notice to quit, continues liable in an action for use and occupation, unless there be a note(*l*) in writing, or a surrender(*m*) by operation of law : but where the tenant acting under such a license, relinquishes the possession, and the landlord accepts it, then the license, coupled with the fact of

(*f*) *Wilson v. Abbott*, 3 B. & Cress. 88; 4 D. & Ry. 693.

(*g*) *Huffell v. Armitstead*, 7 Carr. & P. 56, by Parke, Baron; and see *Doe dem. Parry v. Hazell*, 1 Espin. N.P.C. 94; *Roe dem. Peacock v. Raffan*, 6 Espin. N. P. C. 4.

(*h*) *Botting v. Martin*, 1 Campb. N. P.C. 318; 2 Moore's Rep. 270, same case, cited.

(*i*) *Mollett v. Brayne*, 2 Campb. N. P.C. 103; 2 Mann. & Ry. 403, same case, in the note; *Thompson v. Wilson*, 2 Stark. N. P. C. 379.

(*j*) *Whitehead v. Clifford*, 5 Taunt.

518; *Dodd v. Acklom*, 7 Jurist, 1017.

(*k*) *Grimman v. Legge*, 8 B. & Cress. 324; 2 M. & Ry. 438; *Taylor v. Chapman*, Peake's Add. Cases, 19; *Sparrow v. Hawkes*, 2 Espin. N. P. C. 505; *Graham v. Whichelo*, 1 Cro. & M. 188; 3 Tyrw. 201.

(*l*) *Mollett v. Brayne*, 2 Campb. N. P.C. 103; *Thompson v. Wilson*, 2 Stark. N. P. C. 379.

(*m*) *Johnstone v. Huddlestone*, 4 B. & Cr. 922; 7 D. & Ry. 411; *Doe dem. Huddlestone v. Johnston*, M'Clell. & Y. 141.

the *change* of possession(*n*), takes effect as a surrender by act and operation of law, and rent falling due after such acceptance cannot be recovered from the original tenant. So, if a lessee underlet, and the landlord, with the assent of such original lessee, by parol, accept the under-lessee as his immediate tenant, such an arrangement will constitute(*o*) a surrender by act and operation of law, within the exception in the Statute of Frauds, and the landlord cannot afterwards recover rent from the original lessee, as the substituted lessee becomes answerable for the subsequent rent: in order, however, to discharge the original lessee(*p*) from his liability, there must be an actual substitution of the new tenant, and a mere contract for that purpose, or an acceptance of rent from the new occupier, will not be sufficient. Where two tenants who held separate farms, each at the same rent, under different landlords, verbally agreed, with the assent of their respective lessors, to exchange their holdings, and each(*q*) accordingly took possession of the other's farm, but there was no agreement in writing on the subject, it was ruled by the Exchequer that the transaction constituted a surrender by operation of law, and a new demise by each landlord to the substituted tenant.

16. Where the occupation of premises originates in fraud or misrepresentation of the owner, and no benefit is derived from them by the occupier, an action does not lie for such use and occupation: a purchaser having entered(*r*) into possession of a dwelling-house under a contract of sale, which was not completed in consequence of a defect in the vendor's title, and the agreement being rescinded, it was determined that the vendor could not maintain an action for use and occupation against the purchaser, who derived no benefit from the premises during the period of six months, while he retained possession: even if the occupation were beneficial, where the parties have entered into an express agreement for sale, it may be productive of much(*s*) hardship

(*n*) *Grimman v. Legge*, 8 B. & Cress. 324; 2 M. & Ry. 438; *Dodd v. Acklom*, 7 Jurist, 1017.

(*o*) *Thomas v. Cook*, 2 B. & Ald. 119; same case, cited 4 B. & Cress. 933, by Bayley, J.; *Reeve v. Bird*, 1 Cro. M. & Rosc. 31; 4 Tyrw. 612; *Woodcock v. Nuth*, 8 Bing. 170; 1 M. & Sc. 317; *Phipps v. Sculthorpe*, 1 B. & Ald. 50; *Sparrow v. Hawkes*, 2 Espin. N. P. C. 505; *The King v. Inhab. of Banbury*, 1 Ad. & Ell. 136; 3 Nev. & M. 292; *Lessee Lynch v. Lynch*, 6 Irish Law Rep. 131; see *Thursby v. Plant*, 1

Saund. 236, A., note (K), 236, C., note (N); *Turner v. Hardey*, 9 Mees. & W. 770.

(*p*) *Graham v. Whichelo*, 1 Cro. & M. 188; 3 Tyrw. 201.

(*q*) *Bees v. Williams*, 2 Cro. M. & Rosc. 581; Tyrw. & Gr. 23, S. C.; *Peter v. Kendal*, 6 B. & Cress. 703.

(*r*) *Kirtland v. Pounsett*, 2 Taunt. 145; *Hearne v. Tomlin*, Peake's N. P. C. 192; *Foster v. Blake*, 2 Huds. & Br. 296; *Rumball v. Wright*, 1 Carr. & P. 589.

(*s*) 3 Stark. Evid. 1183, note.

the vendor be suffered, by reason of his own breach of contract, to convert the intended purchaser into a tenant, and to bind him by an implied contract, wholly different from the express agreement of the parties: but if a party be let into possession under a contract of purchase, which is afterwards broken off(*t*), he is liable, in an action for use and occupation at the suit of the vendor, for the period during which possession is retained after the agreement of sale has been rescinded: while a party continues in possession under a contract of sale, he is tenant at will, under a distinct stipulation that he shall hold rent-free, but when that contract is at an end, he becomes tenant at will unconditionally, and from that time he has to pay for his occupation. A person who claimed the ownership of premises by adverse title, having obtained possession from the rightful tenant by a fraudulent misrepresentation of facts, the peculiar circumstances of the case(*u*) were deemed sufficient to raise an implied contract for the use and occupation of the premises for the time, while the excluded tenant was improperly kept out of the occupation.

(*t*) *Howard v. Shaw*, 8 Mees. & W. 118.

(*u*) *Hull v. Vaughan*, 6 Price, 157.

CHAPTER XII.

USE AND OCCUPATION.

17. *Tenant cannot dispute the Party's Title from whom he got Possession.*
18. *When Possession is not obtained from Claimant, the Occupier may avoid Acts done by him through Mistake.*
19. *Tenant cannot dispute the Title of a Party in Privity with his Landlord.*
20. *Where Defendant did not enter under Claimant, Rent recoverable only from the Time of Plaintiff's acquiring the legal Estate.*
21. *Tenant may shew his Lessor's Title determined.*
22. *Where Lessee holds from Mortgagor, Payments to Mortgagee, after Notice, protected.*
23. *Use and Occupation lies at Suit of Annuitant having Right to re-enter.*
24. *Assignee of yearly Tenant continues to hold on same Terms as his Predecessor.*
25. *When Use and Occupation lies against wrongful Occupier.*
26. *Tenant evicted of Part by his Landlord, may give up the Residue.*
27. *Use and Occupation lies by and against Corporation aggregate.*
28. *— lies for permissive Occupation of incorporeal Hereditament.*

PLEADINGS.

29. *Form of declaring for Use and Occupation.*
30. *When Debt for Use and Occupation preferable to Assumpsit.*
31. *Declaration by surviving Occupier.*
32. *— against surviving Occupier.*
33. *— on a Holding under a Jointure in common.*
34. *— against an Executor representative Capacity.*
35. *Special Pleas.*
36. *Judgement by Default.*

EVIDENCE.

37. *Contract in Writing for a Term must be proved.*
38. *— unless Plaintiff make Case without disclosing it.*
39. *What Facts may be proved by oral Testimony, without production of written Contract.*
40. *Statement by a Party of the contents of a written Instrument admissible.*
41. *Where Instrument referred to in Contract requires a Stamp.*
42. *Entry in Writing of the Term, if not signed, does not require a Stamp.*

17. A TENANT is not allowed to dispute (a) the title of the person or person from whom he obtained possession, or by whose licence or permission he occupied the premises, although such person

(a) *Lewis v. Wallace*, Bull. N. P. 139; *Sayer*, 13; *Cooke v. Loxley*, 5 T. R. 4; *Brooksby v. Watts*, 6 Taunt. 133; 2 Marsh. 38; *Barwick dem. Mayor of Richmond v. Thompson*, 7 T. R. 488; *Doe dem. Prichitt v. Mitchell*, 1 Bro. & B. 11; 3 Moore, 229; *Doe dem. Knight v. Smythe*, 4 M. & Selw. 348; *Dancer v. Hastings*, 4 Bing. 2; 12 Moore, 34;

Agar v. Young, Carr. & M. 7

(b) *Doe dem. Johnson v. Ad. & Ell.* 188; 4 Nev. & M.

(c) *Hodson v. Sharpe*, 10 L. J. 17; 4 Nev. & M. 25; 1 Moo. 385; *Fleming v. Gooding*, 10 L. J. 4 Moo. & Sc. 450; *Jones dem. Driscoll*, 2 Huds. & Br. 552.

no title, or only an equitable title(*d*), or had procured an assignment of the interest by fraud(*e*). Where a party occupies by sufferance of another, and it appears on the plaintiff's proofs in an action for use and occupation, that he has only an equitable interest for life, and that the legal estate is outstanding(*f*) in a third person, the occupier cannot avail himself of that defence, as the term "landlord" used in the Statute is considered to mean the person, whom the defendant has recognized in that capacity. A person obtaining possession(*g*) fraudulently from, or by license of another, is not permitted to contest the title of the person from whom the possession is procured, until after the premises have been restored to the former occupier.

18. No general rule is more important, or more strictly observed, than that which precludes a tenant from disputing his landlord's title, as it is always open to a tenant who is not guilty of laches(*h*), to explain and avoid acts done by him under mistake or through misrepresentation, where he has not obtained possession from the claimant; and where a tenancy is attempted to be established merely by evidence of payment of rent, without proving any actual demise, or that the tenant had been let into possession by the person to whom payment was made, evidence is admissible(*i*), on the part of such tenant, to explain the payment of rent, and to shew on whose behalf the rent was received.

Where premises were let by auction, and conditions were signed by the owner, stipulating that the rent was to be paid into the hands of the auctioneers, who were creditors of the lessor: in an action for use and occupation by the auctioneers(*j*) against the person who was declared tenant at such letting and entered into possession, it was ruled that the auctioneers only let the premises as agents of the owner, and were to receive the rent as his agents, and that the action should have been brought in the name of the principal. If a steward put a person into possession of premises as tenant to a landlord, whom he does not name, it may be afterwards shewn(*k*) by parol evidence who the land-

(*d*) *Doe dem. Nepean v. Budden*, 5 B. & Ald. 626; 1 D. & Ry. 243; *Doe dem. Colnaghi v. Bluck*, 8 Carr. & P. 54; *Naish v. Tatlock*, 2 H. Bla. 323.

(*e*) *Parry v. House*, Holt's N. P. C. 10 and the note.

(*f*) *Dolby v. Iles*, 11 Ad. & Ell. 335; 1 Nev. & P. 287; *Cooper v. Blandy*, 1 B. & C. 45; 4 Moo. & Sc. 562.

(*g*) *Doe dem. Johnson v. Baytup*, 3 B. & Ell. 188; 4 Nev. & M. 837.

(*h*) *Doe dem. Plevin v. Brown*, 7 Ad. & Ell. 447; 2 Nev. & P. 592; *Gregory v. Doidge*, 3 Bing. 474; 11 Moore, 394; *Midgley v. Lawder*, Hayes & J. 479; *Jew v. Wood*, Craig & Ph. 195.

(*i*) *Doe dem. Harvey v. Francis*, 2 Moo. & Rob. 57.

(*j*) *Evans v. Evans*, 3 Ad. & Ell. 132.

(*k*) *Fleming v. Gooding*, 10 Bing. 549; 4 Moo. & Sc. 455.

lord was, and the tenant will not be suffered to controvert the the unnamed lessor.

19. Upon the same principle that a tenant cannot dispute sor's title, he will not be allowed to impeach the title of any having a privity of interest with the chief landlord: a mesne l having demised for a term which expired, it was ruled that the tenant(*l*) could not dispute the title of the chief landlord, no tenant be allowed to impeach the title of a person deriving by ment(*m*) from the lessor. So a person holding under a tenant cannot, after his lessor's death, set up(*n*) title in a third person, purpose of defeating the right of a remainder-man deriving un same title as the lessor. One Nevitt having let a tenant into sion, afterwards told him that the premises belonged to B whom the rent in future should be paid: the tenant having co another person claimed by title paramount to Nevitt, and it was r that Butler was entitled to stand in Nevitt's place, and that the who could not dispute Nevitt's title, was equally precluded fr puting Butler's.

20. In an action for use and occupation, where the de does not come in under the plaintiff, rent is only recoverable fr time the plaintiff acquired the legal estate in the demised premi though he had long before obtained an assignment of the ec interest: one Carpenter entered upon a leasehold cottage unde who soon afterwards mortgaged the premises; the lessor, in 16 signed the equity of redemption to the plaintiff, who acquired tl estate shortly previous to bringing the action, and it was ruled(such assignee of the reversion could only recover rent from the obtained the legal estate by assignment of the mortgage, fo there is no express demise, a tenancy can only be implied in f the party having the legal estate.

21. Formerly a tenant was not allowed in an action for use cupation, to shew that the title of the party from whom he c

(*l*) *Barwick dem. Mayor of Richmond v. Thompson*, 7 T. R. 488.

(*m*) *Rennie v. Robinson*, 1 Bing. 147; 7 Moore, 539; *Cooper v. Blandy*, 1 Bing. N. C. 45; 4 Moo. & Sc. 562; *Doe dem. Bullen v. Mills*, 2 Ad. & Ell. 17; 4 Nev. & M. 25; *Doe dem. Marlow v. Wiggins*, 7 Jurist, 529.

(*n*) *Doe dem. Colemere v. Whitroe*, D. & Ry. N. P. C. 1, at the end of 2 D. & Ry. Rep.; *Johnson v. Mason*, 1 Espin.

N. P. C. 89.

(*o*) *Hall v. Butler*, 10 Ad 204; 2 Perry & Dav. 374; *Jew Cr. & Ph.* 195.

(*p*) *Cobb v. Carpenter*, 2 C. P. C. 613, in the note; *Morge* 2 Mann. & Ry. 303; *Bucl Simpson*, 5 Tyrw. 347, by Par Cro. M. & Rosc. 834; *Brydges* 3 Q. B. Rep. 603; 2 Gale & I

ssion had ceased, but the rule on this subject(*q*) has been relaxed, evidence will now be received to establish that the lessor's title to property had expired, or determined(*r*), or passed to another, and the tenant, as soon as he was aware of the fact, had entered the new landlord: when the title of the original lessor is either terminated or transferred to another, the occupier is then continued by sufferance of the real owner, who is entitled to recover the rent in action for use and occupation: and even payment(*s*) of rent to a person which became due after his title expired, and after the tenant received notice of an adverse claim, does not amount to a recognition of the title of the lessor, or to a virtual attornment, unless, at the time of making such payment, the tenant knew the precise nature of the adverse claim, or the manner in which the lessor's title expired.

. If tenants holding under demises made by a mortgagor subsequent to the mortgage, pay their rents to the mortgagee after notice at that purpose, such payments(*t*) will be protected, and the lessees cannot be estopped in any proceeding against them by the mortgagor or mortgagee from recovery of the same rents, from shewing the existence of the prior mortgage, and their compliance with the mortgagee's demand of pay-

ment of a dwelling-house being granted in mortgage, the mortgagor continued in possession, and let the house furnished to the defendant: the mortgagor being declared bankrupt, let the house and furniture, by consent of the assignees of his estate, to the defendant as a weekly(*u*) tenancy, at a gross rent, and the mortgagee, at the end of three weeks, gave notice to the defendant requiring payment of his rent: in an action for use and occupation of the house and furniture, at the suit of the assignees against the occupier, it was ruled they were entitled to recover a proportion of the rent as compensation for the use of the furniture, and that the mortgagee had only a right to any profit derived

Claridge v. M'Kenzie, 4 Mann. & Gr. 3; 4 Scott, N.R. 796; *Doe dem. v. Ramsbotham*, 3 M. & Selw. 268; *Doe dem. Lowden v. Watson*, 2 N. P. C. 230; *Doe dem. Strode v. Tyrw. & Gr.* 19; 2 Cro. M. & Gr. 68.

Agar v. Young, 1 Carr. & M. 78; *Westwood*, 2 Campb. N. P. C. 109; *Barnes v. Cooper*, 1 Gale & Dav. 109; *Q. B. Rep.* 256; *Hopcraft v. King*, 1 Bing. 613; 2 Moo. & Sc. 760; *Wright v. Henderson*, 5 Irish Law Rep. 10.

Penner v. Duplock, 2 Bing. 10;

9 Moore, 38; *Gregory v. Doidge*, 3 Bing. 474; 4 Moore, 394; *Neave v. Moss*, 1 Bing. 360; 8 Moore, 389; *Brook v. Biggs*, 2 Bing. N. C. 572; 2 Scott, 803; *Claridge v. M'Kenzie*, 4 Mann. & Gr. 143; 4 Scott's N. Rep. 796.

(*t*) *Johnson v. Jones*, 9 Ad. & Ell. 809; 1 P. & Dav. 651; *Waddilove v. Barnett*, 2 Bing. N. C. 538; 2 Scott, 763; 4 Dowl. Pr. Ca. 347; *Kingsmill v. Watson*, 2 Huds. & Br. 608; and see *Wheeler v. Branscombe*, 7 Jurist, 1131.

(*u*) *Salmon v. Matthews*, 8 Mees. & W. 827.

exclusively from the house: it was contended that the entire rent was issued(*v*) out of the house, and was payable by the occupier to the mortgagee, and that any apportionment of such rent was properly coverable in an action by the assignees against the mortgagee, and ought not to be apportioned at the expense of the occupier.

23. Theophilus Beavan having granted a rent-charge out of certain lands to one Chawner, with the usual clauses of distress and re-entry in case of non-payment, afterwards demised the premises to the defendant, Boulter, for a term of sixty-one years: the rent-charge being in arrear, the owner recovered judgement in ejectment, grounded on the clause of re-entry, and the lessee, in order to avoid the execution of the writ of possession, verbally attorned to Chawner, and thenceforward(*w*) paid him rent: and it was ruled that such attornment and payment of rent, created a new tenancy between the annuitant and the lessee, determinable on payment of the arrears of the rent-charge, when the tenant's lease for years would revive: and that the annuitant had a right to recover possession from the lessee, on giving notice to quit, and would, of course, be entitled to enforce payment of rent in an action for use and occupation against the lessee.

24. In order to maintain this action, it must be shewn that the defendant(*x*) occupied the premises by the plaintiff's permission, or by the permission of some person from whom the plaintiff derives, as a mere stranger, or(*y*) adverse claimant, or *cestuique*(*z*) trust will not be suffered to try his title by this mode of proceeding; however, proof of payment of rent out of the premises by the defendant in the capacity(*a*) of tenant to the plaintiff, or that the tenant submitted to a distress(*b*) for rent, or otherwise recognized(*c*) the plaintiff's title, is a sufficient *prima facie* case. Upon a holding by a yearly tenant, if the reversion descends to the heir of the lessor, and he does not give notice to quit, the tenancy will continue, or if a new party enter into possession(*d*) as assignee of the original tenant, and notice to quit be not given, such assignee will become tenant on the same terms as his predecessor,

(*v*) Farewell *v.* Dickenson, 6 B. & Cress. 251; 9 D. & Ry. 245.

(*w*) Doe *dem.* Chawner *v.* Boulter, 6 Ad. & Ell. 675; 1 Nev. & P. 650; Birch *v.* Wright, 1 T. R. 378.

(*x*) Morgan *v.* Ambrose, Peake's Evidence, 255; Woolley *v.* Watling, 7 Carr. & P. 616.

(*y*) Wybrants *v.* Tallon, Vern. & Scr. 268-279; Clarence *v.* Marshall, 4 Tyr. 147; 2 Cro. M. & R. 495.

(*z*) Morgell *v.* Paul, 2 Mann. & Ry.

303.

(*a*) Strahan *v.* Smith, 4 Bing. 95; 12 Moo. 289.

(*b*) Panton *v.* Jones, 3 Campb. N.P. C. 372; Cooper *v.* Blandy, 1 Bing. N. C. 45; 4 Moo. & Sc. 562, S. C.

(*c*) Townsend *v.* Davis, Forrest, 120; Doe *dem.* Jones *v.* Driscoll, 2 Huds. & Br. 552.

(*d*) Buckworth *v.* Simpson, 5 Tyrw. 344-354, by Parke, Baron.

se the relation of landlord and tenant will be implied from the on of the parties : if the law did not imply a contract of this , the consequence would be, that in such cases no action could ported for any breach of the original terms of demise, either in ting repairs, or in violating specified modes of cultivation, unless it by the executors of the original landlord against the personal ntatives of the original lessee ; which would be most inconve- and perhaps impracticable, after a lapse of several years, for it is hat neither the English Statute(*e*), 32 Hen. VIII. c. 34, nor the onding Irish Act, apply to any demises except those made by re. Lands being let by instrument in writing, not under seal, : year certain, and then from year to year, so long as both par- ased, with various stipulations, as to cultivation(*f*) and repairs, ant entered, and on his decease, his executors continued to , and having paid rent for several years, it was held they were ully liable for breaches of the stipulations contained in the in- nt of demise, and were properly sued in *assumpsit*, on an implied e to perform them, founded on the consideration of the lessor's ing from giving notice to quit, and of the continuance of the exe- in occupation : but where a farm was holden by lease, *not under* r seven years, reserving rent, and containing various agricultural tions, and the fee was afterwards, and during the continuance of aise, conveyed to a purchaser, who gave the lessee notice of the ance : in an action of *assumpsit* by the purchaser(*g*) against the or non-observance of the stipulations in the lease, the lessee de- : tenancy, and traversed the breaches : the tenancy was proved, was contended the action would not lie, as a special contract se could only be assigned by the operation of the Statute of Re- s(*h*), which is confined to leases under seal ; and as the tenant r a fixed term, which the assignee of the freehold had no power rmine, this case was distinguishable from *Buckworth v. Simp-* however, it became unnecessary to decide this point, as there plea raising a question as to the existence of a contract between intiff and defendant.

Where a person wrongfully obtains possession of another's the owner may sue him either as a wrong-doer, or treat him as

32 Hen. VIII. c. 34, English ; 10
 sess. 2, c. 4, Irish.
Buckworth v. Simpson, 5 Tyrw.
 Cro. M. & R. 834, S. C.
Rydgcs v. Lewis, 2 Gale & Dav.
 Q. B. Rep. 603, S. C. ; *Morti-*

mer v. Preedy, 3 Meeson & W. 602.

(*h*) 10 Car. I. Sess. 2, c. 4, Irish ; 32
 Hen. VIII. c. 34, English.

(*i*) *Buckworth v. Simpson*, 5 Tyrw.
 344 ; 1 Cro. M. & Rosc. 834, S. C. .

a tenant(*j*) in an action for use and occupation, but the owner cannot maintain *assumpsit* after treating(*k*) the occupier's act as a trespass. If the possession of a yearly tenant be evicted by ejectment grounded upon notice to quit, the landlord may, in an action for use(*l*) and occupation, recover the profits accruing previously to the time of the demise in ejectment: and if the interest of a tenant holding under an equitable article or accepted proposal, be defeated by ejectment for nonpayment of rent, the landlord, by the provisions of the Irish Statute(*m*), 5 Geo. II. c. 14, is entitled to have recourse to the same remedies for arrears of rent due out of the premises up to the time of execution executed in such ejectment, as he might have had against the lessee or his assignee, if no such ejectment had been brought.

26. If a lessee, holding by indenture of lease, be wrongfully evicted by his lessor from any parcel(*n*) of the demised premises, the whole rent is suspended until the party be reinstated, but if a tenant holding by parol, or by instrument not under seal, be evicted by his landlord from part of the premises, he may treat his tenancy as absolutely determined, by giving up possession(*o*) of the residue, and will be discharged from further liability to rent; and if, after such eviction of part, the tenant continue to hold the remainder, he will be liable to make fair compensation for the portion which he retains, either in an action of *assumpsit* or of debt for use and occupation. A yearly tenant having underlet part of the demised premises to one Badger, the head-landlord served Badger with notice to quit, upon which he deserted the part of the lands he had previously occupied, and it remained untenanted for a year(*p*): Lord Ellenborough ruled that such act of the head-landlord was equivalent to an eviction of the part of the lands holden by Badger, and suggested that an eviction might have been pleaded to the demand for the whole rent, in an action for use and occupation against the intermediate tenant. A person having taken a mansion-house and farm, under an agreement that he should enjoy the exclusive privilege of sporting over the manor in which the farm was

(*j*) *Foster v. Stewart*, 3 M. & Selw. 191; *Davis v. Morgan*, 4 B. & Cress. 12; 6 D. & Ry. 42; *Monypenny v. Bristow*, 2 Russ. & M. 127, and *Pearce v. Day*, there cited.

(*k*) *Birch v. Wright*, 1 T. R. 378; *Jenner v. Clegg*, 1 Moo. & Rob. 213; *Bridges v. Smith*, 5 Bing. 410; 2 Moo. & P. 470; *Daly v. Colbert*, 3 Irish Law Rep. 355; *Pulteney v. Warren*, 6 Vesey, 87.

(*l*) *Doe dem. Cheny v. Batten*, 1 Cowp.

246; *Adams on Ejectment*, 380.

(*m*) 5 Geo. II. c. 4, s. 2, Irish.

(*n*) *Salmon v. Smith*, 1 Saund. 204, note 2.

(*o*) *Grand Canal Co. v. Fitzsimons*, Huds. & B. 449; *Smith v. Raleigh*, Campb. N. P. C. 513; *Stokes v. Cooper*, 3 Campb. N. P. C. 514, note; and *Reeve v. Bird*, 1 Cro. M. & Rosc. 336, and the note; 4 Tyrw. 612, S. C.

(*p*) *Burn v. Phelps*, 1 Stark. N. P. 94.

at a gross yearly rent of £450, it appeared(*q*) that the lessor ought to confer any such privilege, and the Court held, that in for use and occupation, the tenant was at liberty to shew an of such exclusive privilege, which formed a substantial part of ct of the demise, and that the jury should ascertain a fair rent d for the occupation, independently of such privilege.

Although a corporate body can only demise by deed, yet they tain debt(*r*) or *assumpsit*(*s*) for use and occupation, because ction does not necessarily suppose any demise, as it is only to recover reasonable satisfaction for the enjoyment of pre-way of an equivalent for rent. Where a benefit has been en-der a corporation aggregate, by the use and occupation of ls, with their permission, the law implies a promise to make n-ensation, which they are capable of accepting, and upon ey may support an action : the relation(*t*) between a corpora-the occupier of land may commence without express contract, gh, in the first instance, the occupation appears to want many gal incidents of the relation between landlord and tenant, the of a year's rent, and its acceptance by the corporation shew relation commenced in contract, and as the corporation may ty to an agreement not under seal, at least for the purpose of it, it can hardly be doubted that the corporation could be a such an instrument for the purpose of being sued on it.

Use and occupation lies for the permissive enjoyment of an in-l hereditament, or servitude, such as an increased supply(*u*) of rough a watercourse, or(*v*) for tolls or stallage(*w*), or for mine-ving in the lessor's land : it has been doubted whether use and on would lie for an incorporeal(*y*) hereditament, unless it was to the realty, but this distinction does not seem to be warranted rmission to enjoy a hereditament has been exercised.

In actions for use and occupation, whether in *assumpsit* or debt, ie(*z*) is transitory ; but the venue may be changed in *assump-*

mlinson v. Day, 2 Brod. & B.
loore, 558; and see Neale v.
, 3 Mees. & W. 764.
an and Chapter of Rochester v.
Campb. N. P. C. 466.
yor and Burgesses of Stafford
Bing. 75; 12 Moore, 260.
erley v. The Lincoln Gas light
l. & Ell. 829; 2 Nev. & P. 283.
vis v. Morgan, 4 B. & Cress.
& Ry. 42; Bird v. Higginson,
Ell. 696; 4 Nev. & M. 505; 6

Ad. & Ell. 824.

(*v*) Galbraith v. Gwynne, Hayes, 244;
Mayor, &c. of Carmarthen v. Lewis, 6
Carr. & P. 608.

(*w*) Mayor of Newport v. Saunders,
3 B. & Adol. 411.

(*x*) Jones v. Reynolds, 4 Ad. & Ell.
805; 6 Nev. & M. 441; 7 Carr. & P.
335; 1 Q. B. Rep. 506; 1 G. & Dav. 62.

(*y*) Minhear v. O'Leary, 1 Irish Law
Rep. 73.

(*z*) Buckworth v. Simpson, 5 Tyrw.

sit to the proper county upon the ordinary affidavit, though *in debt* the venue(*a*) will only be changed on an affidavit stating special grounds.

The declaration need not specify the place(*b*), nor any of the particulars of the demise, and a declaration stating that the subject(*c*) of the occupation consists of “*premises with the appurtenances*,” is a sufficient description: the declaration must comprise the whole of the demise premises, for if it appear that any portion be omitted, the action cannot be sustained: under an agreement to pay a yearly rent for a *house and lawn*, it was ruled(*d*) that a declaration for the use and occupation of the house (omitting the lawn), was insufficient. However, where a party declared for the use and occupation of a messuage(*e*) with the appurtenances, the evidence was of a demise, not under seal, of a messuage with a garden and paddock, and upon a point saved the Court held there was no variance: so if there be a demise of a house and *furniture*, the latter(*f*) need not be noticed, as the rent issues out of the realty.

Where a declaration contained a count for use and occupation, without alleging any promise to pay(*g*), adding the usual money counts, with a breach for nonpayment of the monies *last-mentioned*, or *any part thereof*, it was held bad on special demurrer, as the first count omitted any promise to pay the sums claimed, and the words “*last-mentioned*” were only applicable to the sums specified in the second count. Where a party agreed by writing not under seal to take a dwelling-house, at a yearly rent payable in advance, it was ruled that rent payable(*h*) in advance was not recoverable in an action for use and occupation, but should be made the subject of a declaration upon the special agreement.

30. If it be uncertain whether the rent is reserved by deed, or by demise not under seal, or if any difficulty be apprehended in proving the tenant's lease, it is prudent(*i*) to declare *generally* in debt for rent on the demise, and to add a count for use and occupation, but it is to be

347; 1 Cro. M. & Rosc. 837; Egler v. Marsden, 5 Taunt. 25; but see Mortimer v. Preedy, 3 Mees. & W. 602.

(*a*) Gore v. Gore, Smythe's Rep. 244; Pratt v. Ward, Alc. & Nap. 145; Duplessis v. Chalk, 2 Stra. 878; Fitzg. 166; 1 Barnard, 379.

(*b*) King v. Frazer, 6 East, 348; Kirtland v. Pounsett, 1 Taunt. 570; Davies v. Edwards, 3 M. & Selw. 380.

(*c*) Bird v. Wilton, 2 Chitty's Preced. Note A., 5th edition.

(*d*) Malone v. Wolfe, 2 Huds. & Br. 267.

(*c*) Bird v. Wilton, 2 Chitty's Preced. 41, note A.; Smith v. Martin, 2 Saund. 401, note 2.

(*f*) Farewell v. Dickenson, 6 B. & Cress. 251; 9 D. & Ry. 245.

(*g*) Wilson v. Mitchell, 1 Longf. & Towns. 275; Harding v. Hibbel, 4 Tyrw. 314; Colhoun v. Fox, 4 Irish Law Rep. 369.

(*h*) Taylor v. White, Armst. M. & Ogle, N. P. Ca. 241.

(*i*) See the form in 2 Chitty's Precedents, 430, and the note B.

that though debt for use and occupation may be laid in any debt for rent on a demise against an assignee of the demises is local, and must be brought in the county where the Debt for use and occupation on a parol demise is not main- the assignee(*j*) of the reversion against the lessee, for an which took place before the assignment of the reversion, as nerely implied from occupation is incapable of being trans-

urviving owner cannot recover for the use and occupation alleged by the declaration to have been enjoyed by his own where it appears they were demised jointly by the plaintiff ther proprietor(*k*) then deceased: the declaration should the defendant was indebted to both for the use and occupa- he permission of both, or that he was indebted to the plain- ise and occupation of the premises enjoyed by the joint per- oth proprietors. In an action by the Dean and Chapter of where the occupation was stated to have been by the per- he *then* Dean and Chapter, and it appeared in evidence(*m*) emises were occupied during the whole period by the per- he preceding Dean and Chapter, the King's Bench were ded on the question whether the action could be main-

wever, upon a joint demise to two persons, an action for upation lies against the survivor, without describing him ause, if both tenants were living, and only one of them were ild be merely the subject(*n*) of a plea in abatement, and e any defence on the general issue.

enants in common demise premises at an entire rent, they in an action for its recovery, but if there be a separate re- each, then there must be separate actions: in an action for upation, it appeared that two tenants in common demised to nt at an entire rent, and afterwards(*p*) required him to pay the rent to each; the Court held that a question should eft to the jury, whether the parties meant to enter into a

er v. Preedy, 3 Mees. & Wyley v. Hodgson, 16 East,

Simmons, 2 Stark. N. P. C. Douglas, 4 B. & Ald. 374.

Simmons, 2 Stark. N. P. Lloyd, J.

nd Chapter of Rochester v.

Pierce, 1 Campb. N. P. C. 466.

(*n*) Richards v. Heather, 1 B. & Ald. 29; Jell v. Douglas, 4 B. & Ald. 374.

(*o*) Martin v. Crompe, 1 Ld. Raym. 341, by Holt, Ch. J.

(*p*) Powis v. Smith, 5 B. & Ald. 850; 1 D. & Ry. 490; Wilkinson v. Hall, 1 Bing. N. C. 713; 1 Scott, 675, S. C.

new contract, with a separate reservation to each, or whether they intended to continue the original reservation and only to alter the mode of receiving the amount.

34. Where a demise is not by deed, an executor cannot be sued in his *representative*(*q*) capacity for use and occupation in his own time, because in such an action he would be *personally* chargeable: the proper mode of charging an executor for use and occupation in his *representative* character is, by stating(*r*) a demise to the testator from year to year, his death, and the defendant's character as executor, whereby he became liable to pay the rent: where the testator or his personal representatives have assigned their interest, a similar form may be adopted, but if an underlease has only been made, instead of an assignment, the occupation(*s*) of the under-tenant is the occupation of the executor, and he is liable in his individual capacity.

35. A plea to an action for use and occupation, that the defendant was evicted by the lessor from the demised premises, is bad on demurrer(*t*), as amounting to the general issue, which is, in effect, a denial that the defendant enjoyed by the sufferance of the plaintiff.

The Statute of Limitations is a good defence to an action by a landlord for rent against a person who had been his tenant from year to year, but who had not, within the preceding six years(*u*) paid rent, occupied the premises, or done any act from which a tenancy could be inferred, though the original holding had not been determined by notice to quit.

36. Judgement by default in debt for use and occupation being final, a writ of inquiry is unnecessary, and therefore if a parliamentary appearance be entered for the defendant, a declaration in debt will save expense and delay, though it has been ruled(*v*) that a writ of inquiry in such actions is not an irregular proceeding.

37. Upon the trial of actions for use and occupation, it frequently occurs that an agreement or accepted proposal for a lease, ascertaining the rent and particulars of the tenancy, was executed between the parties, which cannot be produced in evidence in consequence of the want of a proper stamp: and if it appears in the course of the plaintiff's evi-

(*q*) *Wigley v. Ashton*, 3 B. & Ald. 101; and see 2 Williams's Executors, 1247, note C.

(*r*) *Dean and Chapter of Bristol v. Guyse*, 1 Saund. 112, note C.

(*s*) *Bull v. Sibbs*, 8 T. R. 327.

(*t*) *Prentice v. Elliott*, 5 Mees. & W. 606.

(*u*) *Leigh v. Thornton*, 1 B. & Ald. 625.

(*v*) *Arden v. Connell*, 5 B. & Ald. 885; 1 D. & Ry. 529; *Brill v. Neele*, 1 Chitty's Rep. 619; *Weald v. Brown*, 2 Cro. & Jerv. 672; *Taylor v. Capper*, 14 East, 442.

he occupation is founded upon a written contract, the instrument must be produced properly stamped, and no general evidence to the contrary will be received. Where a witness examined on behalf of the plaintiff stated, on his cross-examination, that there had been an agreement in writing between the parties, which was not stamped, Lord Brougham (in *Wright v. Carter*), that the plaintiff was bound to produce the document as it might contain stipulations for the defendant's benefit, and that he failed to do so, was held to be a nonsuit as the document was not stamped. In order to exclude parol evidence of the contract, it is not sufficient that there was some written agreement relative to the holding, but it must be proved that such agreement was entered into between the parties, and was in force at the time to which the parol evidence offered is to be applied. A memorandum of an agreement was drawn up by the plaintiff's steward upon the letting of premises, the terms of which were agreed to by the tenant, by which he agreed to bring a surety on the day and sign the contract: this stipulation not being complied with, the instrument was treated merely as an unaccepted memorandum, and it was held that the contract might be proved by parol evidence.

The existence of an agreement in writing, regulating the tenancy, may appear on the direct or cross-examination of the plaintiff's witnesses, the non-production of the instrument is a defect in the plaintiff's case, which it will be incumbent on him to prove, but if the plaintiff establish a *prima facie* case without producing the instrument, and there was any written contract, and the existence of an agreement in writing is proved by the defendant's witnesses, its non-production will not be a bar to the plaintiff's recovery.

v. Palmer, 3 Espin. N.P. 241; *dem. St. John v. Hore*, 2 C. 724; *Hodges v. Drake*, 10 B. & P. 270; *Fenn dem. Thoburn*, 6 Bing. 533; 4 Moo. & P. 100; and see *Strother v. Barr*, 2 Moo. & P. 207; *Butler v. The Irish Law Rep.* 464; *The case of Merthyr-Tydvil*, 1 B. & P. 100.

Wood v. Morris, 12 B. & P. 100; *late v. Kinsey*, 4 Tyrw. 100; *M. & Rosc.* 38, S. C.; *Hull v. M'Carthy*, 4 Irish L.R. 100.

Bingham v. Cartwright, 26 B. & P. 100; *Trewhitt v. Lambert*, 473; 3 P. & Dav. 676, 100; *ing v. The Inhabitants of* 100; *ad. & Ell.* 514; 4 Nev. &

M. 375; *Dalison v. Stark*, 3 Espin. N. P. C. 163.

(z) *Fielder v. Ray*, 6 Bing. 332; 3 Moo. & P. 659; *Damer v. Langton*, 1 Carr. & P. 168; *Reed v. Deere*, 7 B. & Cress. 261; *The King v. Inhabitants of Padstow*, 4 B. & Adol. 208; 1 Nev. & M. 9; *The King v. Inhabitants of Rawdon*, 8 B. & Cress. 708; 3 M. & Ry. 426; *Marston v. Dean*, 7 Carr. & P. 13; *Henry v. Ld. Westmeath*, 1 Ir. Circ. Rep. 809.

(a) *Doe dem. Frankis v. Frankis*, 11 Ad. & Ell. 792; 3 P. & Dav. 565; *Magnay v. Knight*, 1 Mann. & Gr. 944; 2 Scott's N. R. 64, S. C.; *Stevens v. Pinney*, 8 Taunt. 327; 2 Moo. 349; *Doe v. Harvey*, 8 Bing. 239; 1 Moo. & Sc. 374, S. C.

production by the plaintiff will not afford any ground of nonsuit if the defendant rely on the instrument, it must be substantiated in the usual manner, as forming part of his defence. A lessee who executes the counterpart of a lease properly stamped, is precluded from impeaching its validity, by producing the original part of the lease, which is not duly stamped(*b*), because after a plaintiff has succeeded in setting out his case as landlord, the tenant will not be allowed to controvert title by means of an unstamped document.

39. Although there be an agreement in writing between landlord and tenant, defining the terms of the holding, yet the fact of a tenancy may be proved(*c*) by parol evidence of payment of rent, even if neither the document itself, if unstamped, nor extrinsic evidence can be resorted to, for the purpose of proving(*d*) the terms of the holding, or the value of the premises, or under whom the defendant claims as tenant. A lease which was rendered void in consequence of a recital made in the instrument by the person deriving under it, was held admissible evidence on his part, in an action for an excessive distress, for the purpose of ascertaining the amount of the rent at the times when payable: and where part of a printed form of lease was struck out before its execution, the Court has a right to look at the instrument(*f*) as it originally stood, and at the alteration subsequently introduced, in order to make out the intention of the parties.

40. Admissions by a party, or his acts amounting to admissions, are admissible evidence against himself, although such admissions may involve a confession of debt, must necessarily be contained in some deed, or writing, and the Court will not allow for admitting such verbal statements of the contents(*g*) of a written instrument, without notice to produce, or accounting for the absence of the document is, that they are not open to the same objection as admissions belongs to parol evidence from other sources, where the written instrument might have been produced: so statements made by a party are admissible to shew the amount of his rent, though it should appear

(*b*) *Paul v. Meek*, 2 Y. & Jerv. 116; *Doe dem. Phillip v. Benjamin*, 9 Adol. & Ell. 644; 1 P. & Dav. 440, S. C.; *Huddleston v. Briscoe*, 11 Vesey, 596; *Atherstone v. Bostock*, 2 Mann. & Gr. 511; 2 Scott, N. R. 637.

(*c*) *The King v. Kingston upon Hull*, 7 B. & Cress. 611; 1 Mann. & Ry. 444; *Doe v. Harvey*, 8 Bing. 239; 1 Moo. & Sc. 374, S. C.

(*d*) *Doe v. Harvey*, 8 Bing. 239; 1

Moo. & Sc. 374; *The King v. Morton*, 3 B. & Ald. 588.

(*e*) *Hutchins v. Scott*, 2 Mee. & W. 809.

(*f*) *Strickland v. Maxwell*, 4 M. & W. 346; 2 Cro. & Mees. 539.

(*g*) *Slatterie v. Pooley*, 6 Mee. & W. 664; *Newhall v. Holt*, 6 Mees. & W. 662; *Bethell v. Blencow*, 2 M. & W. Gr. 119; 3 Scott's N. R. 568.

k) instrument on the subject existed, which for want of a *deed* could not be produced.

Where the parties to an agreement, after having signed it, introduce a second agreement, which cannot be read in evidence for want of a stamp, the first agreement is at an end; and if an agreement has been duly stamped, and it appears(*i*) on the plaintiff's case, that a further agreement was made between the parties after such agreement was stamped, the second agreement must be proved in order to shew that the original agreement is in force; and if the first agreement be completed by the new agreement, the plaintiff's case must stand on the latter instrument be duly stamped. Where parties enter into a verbal contract for a lease, upon the stipulations contained in the lease of the same premises which had been(*j*) granted by the lessor to the same person, it was decided that the lease which formed the substance of the agreement was not admissible in evidence unless duly stamped. A party having agreed, by an instrument duly signed and stamped, to let premises as specified in an annexed lease which was abandoned, subject to the conditions in such abandoned lease, it was ruled(*k*), that the instrument incorporated the abandoned lease, and by such means constituted a perfect demise, and as the agreement was duly stamped, that the annexed lease might be read in evidence, though unstamped. And where a party in possession of an adverse party is presumed to be properly(*l*), if not produced by him after notice for that purpose, that all parts of an agreement are prepared, and one part only is stamped, the unstamped part will be received as secondary evidence, and the party's neglect and refusal to produce the stamped part.

Where a book was produced by a witness containing the entry of an agreement for the demise of a house at a yearly rent, and the witness testified that he *let* the premises as his father's agent in his presence, and the terms of the letting were then reduced by him into writing by the witness, by mistake, and signed by the tenant's wife in her husband's absence for the purpose of binding him, but were not signed either by the witness or by his father, and the witness further said, he had no knowledge of the circumstances, except from the entry, though on the whole he entertained no doubt of the facts: it was decided(*m*),

Hard v. Smith, 3 Mann. & Gr. 574.

Deere v. Deere, 7 B. & Cr. 261.

Power v. Power, 7 B. & Cress. 131, S. C.; but see *Matthews v. Matthews*, 2 Chitty's Rep.

(*k*) *Pearce v. Cheslyn*, 4 Ad. & Ell. 225; 5 Nev. & M. 652.

(*l*) *Munn v. Godbold*, 3 Bing. 292; 11 Moore, 49; *Waller v. Horsfall*, 1 Camp. N. P. C. 501; *Garnons v. Swift*, 1 Taunt. 507.

(*m*) *The King v. Inhabitants of*

that the entry was neither a lease, nor an agreement for a lease, but a mere memorandum to prevent mistake, *not requiring any stamp*, and that the witness had a right to look at the entry to refresh his memory and then to give parol evidence of the demise : and the question was not whether the parties *acted* upon the entry, but whether (n) the document itself was a *binding* instrument, which could have been enforced if either party had refused to act on it.

St. Martin's, Leicester, 2 Ad. & Ell. 210; 4 Nev. & M. 202; and see The King v. Inhab. of Wrangle, 2 Ad. & Ell. 514; 4 Nev. & M. 375; Ld. Bolton v. Tomlin, 5 Ad. & Ell. 856; 5 Nev. M. 652, S. C.
 (n) Drant v. Brown, 3 B. & Cre 665; 5 D. & Ry. 582.

CHAPTER XIII.

PAYMENT.

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| <i>now constituted.</i> | 10. <i>Determination of Agent's Authority.</i> |
| <i>to Agent in the ordinary</i> | 11. <i>Letter of Attorney, when irrevocable.</i> |
| <i>course of Business.</i> | 12. <i>Payment of Part of ascertained Demand, no Satisfaction of Residue.</i> |
| <i>of Party's Attorney.</i> | 13. <i>Security given on a general Arrangement with Creditors.</i> |
| <i>of Acts of a Person as-</i> | 14. <i>Release of Debt by Instrument under Seal.</i> |
| <i>suming the Character of Agent.</i> | 15. <i>When Money paid can be recovered back.</i> |
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| <i>Circumstances warranting the Pre-</i> | |
| <i>sumption of Agency.</i> | |
| <i>cannot substitute another in</i> | |
| <i>place.</i> | |
| <i>Mode of Payment discharges</i> | |
| <i>debtor.</i> | |
| <i>Effect of one Debt in Discharge</i> | |
| <i>of another.</i> | |

PERSON competent to do any act, or to manage any business on behalf, or on his own account, may employ or substitute another for him, and the person who undertakes the performance of the act, is bound to render an account of the manner in which it is executed: this authority may be conferred by letter of attorney by any instrument in writing, directing certain matters to be done by the person employed, or by verbal instructions, or may be implied in the relation subsisting (a) between the parties, and the nature of the business.

Payment to an authorized agent in the ordinary course of business is binding on the principal, and if the amount of a debt be paid to a person found in a merchant's counting-house, and appearing to be connected with the conduct of the business, it will be a good payment, although not received by any person in his employment, because the debtor has a right to suppose that a trader will allow persons to intermeddle with his concerns, in his counting-house without his sanction: but if a person intending to pay a mortgage to a merchant, hand the amount (d) to a clerk in his counting-house, or an executor pay the amount of a legacy to a shopman

Long v. Busk, 15 East, 38.
Long v. Lewes, 1 Campb. N.P.
Long v. Inglis, Holt's N.
Long v. Ramsay, 9 Cl.

(c) *Barrett v. Deare*, Moo. & Malk. 200; *Wilmott v. Smith*, Moo. & Malk. 238.

(d) *Sanderson v. Bell*, 2 Cro. & M. 304-313; 4 Tyrw. 244, S. C.

serving in the shop of the legatee, who had been in the habit of paying his master's weekly bills, or if a payment be made to a clerk or shopman on account of his master, on foot of any collateral(*e*) transaction, and not in the usual course of trade, nor by the master's authority, such payment will not bind the employer, unless the money proved to have come into his hands.

3. An attorney employed to carry on legal(*f*) proceedings for recovery of a debt, has an implied authority to receive payment on demand, or to bind his client by a *bonâ fide* compromise of the action(*g*), but payment to the attorney's clerk(*h*), or to a country agent who was merely the agent of the plaintiff's attorney(*i*) in causing a debtor to be arrested, will not discharge the demand. Payment, however, to the attorney(*j*) on record, or to the town agent of a county attorney, is sufficient, and where costs are ordered to be paid to a solicitor in a cause, his attorney(*k*) is competent to demand and receive the amount, without any express power of attorney for that purpose.

4. The authority must be antecedently given to the agent, or be subsequently adopted(*l*) by some act of recognition on the part of the principal, or by his acquiescence in the agent's acts, when they come to his knowledge, for if the principal do not give notice in a reasonable time(*m*) after he is informed of what has been done, his assent is presumed, as he is considered to adopt the acts of a person who is permitted to represent himself as acting by his authority, and will be answerable(*n*) for credit subsequently given to such person in that city. A master having sent his servant to purchase goods on credit from a shopkeeper, afterwards paid for them, and having again sent the same servant to the same shop with money to pay for goods, when he embezzled the money, the master was held answerable for the price, as he had given credit to the servant by adopting his former authority; but if there had been no previous dealings, from which an author-

(*e*) *Kirton v. Braithwaite*, Tyrw. & Gr. 945; 1 Mees. & W. 310; 5 Dowl. Pr. Ca. 100, S. C.

(*f*) *Powell v. Little*, 2 W. Blackst. 8; *Yates v. Freckleton*, 2 Doug. 623; *Coore v. Callaway*, 1 Espin. N. P. C. 115.

(*g*) *Vorley v. Garrad*, 2 Dowl. Pr. C. 490.

(*h*) *Coore v. Callaway*, 1 Espin. N. P. C. 115.

(*i*) *Yates v. Freckleton*, 2 Doug. 623.

(*j*) *Morton's case*, 2 Show. 139; *Crozer v. Pilling*, 4 B. & Cress. 26, by

Bayley, J.; *Griffiths v. William R.* 710.

(*k*) *Mason v. Whitehouse*, 4 B. C. 692; 6 Scott, 575.

(*l*) *Rusby v. Scarlett*, 5 Espin. C. 76.

(*m*) *Nicholson v. Hooper*, 4 M. Cr. 185.

(*n*) *Neale v. Erving*, 1 Espin. 61.

(*o*) *Hazard v. Treadwell*, 506; *Todd v. Robinson*, Ry. 217.

buy on credit could have been inferred, the master would not have been deemed liable(*p*) for goods furnished in his name to the servant.

When one party means to act as agent for another, and acts accordingly, a subsequent ratification by the other is equivalent to a prior(*q*) command, and it is no objection that the name of the agent was unknown to the party ratifying, at the time of the ratification. The owner of a dwelling-house demised it at a certain rent, and gave the key of the street door to the tenant's wife, who entered into possession, but in consequence of disputes between the parties, and before any rent became due, the tenant's wife gave back the key to the owner himself, which was accepted by him, and in an action for use and occupation, it was ruled(*r*) that the jury were warranted in inferring that the tenant's wife was her husband's general agent in the transaction, and that the landlord's acceptance of the key from her, was a recognition of her authority to surrender the premises, and constituted a surrender by act and operation of law.

5. There is a material distinction between the powers of a general agent, who is intrusted by a person to transact all his business, and an agent(*s*) appointed for a special purpose, who is only employed to act concerning some particular object: the acts of a general agent, so long as he keeps within the scope of his authority, though he may transgress his private instructions, are binding on his principal: if goods are placed in the custody of a person whose common business it is to sell, without limiting his authority, an implied authority to sell is thereby conferred: and if the servant of a horse-dealer, with express directions not to warrant, give a warranty, the employer is bound, because the servant(*t*) having a general authority to sell, is in a condition to warrant, and the master has not notified to the public that the general authority is circumscribed. In like manner, where one of several partners is permitted to sell the partnership goods, or a servant the goods of his master, though they(*u*) exceed their authority, yet in the one case the master, and in the other the partners, are bound, because the vendors being intrusted with a general authority, it cannot be expected that a *bonâ fide* purchaser should be aware it was limited by

(*p*) *Pearce v. Rogers*, 5 Espin. N. P. C. 214.

(*q*) *Foster v. Bates*, 7 Jurist, 1093; *Hall v. Pickersgill*, 1 Bro. & B. 282; 3 Moore, 612, S. C.

(*r*) *Dodd v. Acklom*, 7 Jurist, 1017.

(*s*) *Fenn v. Harrison*, 3 T. R. 757, by Buller, J.; *Howard v. Braithwaite*, 1

Vesey & B. 209.

(*t*) *Pickering v. Busk*, 15 East, 45, by Bayley, J.; *Fenn v. Harrison*, 3 T. R. 760, by Ashurst, J.

(*u*) *Nickson v. Brohan*, 10 Mod. 109; *Whitehead v. Tuckett*, 15 East, argu. 405.

any restrictions. Where, however, the holder of a bill of exchange employed an agent to get it discounted, and positively refused to endorse it, the agent having prevailed on a third person to endorse the bill, it was ruled^(v) that the original holder was not bound by the act of such person, who was only a special agent under a limited authority not to endorse the bill.

6. If goods are sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe; but the presumption of any^(w) authority fails, when the facts do not warrant an inference that the person, to whom the goods are intrusted, is a common agent for the sale of property of that description: if a watch is left with a watchmaker to be repaired, he is not exhibited to the public as owner, and credit is not given to him, merely because he has possession of the watch, and the owner would not be bound by its sale.

7. An agent cannot substitute another in his place to transact the business intrusted to his care, because an exclusive personal trust is reposed in the party employed, which he cannot delegate to another, without the assent of his principal, express or implied: *delegata(x) potestas non potest delegari*. The authority conferred on an agent is merely personal, unless from the express language used, or from the presumptions growing out of the particular transaction, the usage of trade, or the general course of dealing, a right can be reasonably inferred to employ others in carrying on some portion of the business, or in executing some part of its details. An agent has an implied authority to resort to all means^(y) necessary, or in the usual course of business generally adopted, for the purpose of attaining the accomplishment of, or incidental to the objects intrusted to his management.

8. The general rule of law is, that if a creditor employs an agent to receive money from a debtor, and the agent receive it, the debtor is discharged against the principal, but if the agent, instead of getting actual payment^(z), sets off money due from himself to the debtor against the demand of the principal, and makes himself debtor to his principal for the amount, though such transaction be done with the debtor's concurrence, he is not discharged: the agent is bound to receive the whole

^(v) Fenn v. Harrison, 3 T. R. 757; 4 T. R. 177.

^(w) Pickering v. Busk, 15 East, 41.

^(x) 2 Inst. 597; Combes's case, 9 Rep. 76, A.; Story's Agency, 14; Cockran v. Irlam, 2 M. & Selw. 301, note; Henderson v. Barnewall, 1 Y. & Jerv. 387;

Catlin v. Bell, 4 Campb. N. P. C. 183.

^(y) Howard v. Baillie, 2 H. Bla. 618; Randall v. Harvey, 2 Ro. Rep. 390.

^(z) Russell v. Bangley, 3 B. & Ald. 395; Todd v. Reid, 4 B. & Ald. 210; 3 Stark. N. P. C. 19, S. C.; Bartlett v. Pentland, 10 B. & Cress. 760.

debt in cash, for otherwise he does not(*a*), by the act between him and the debtor, put himself into the situation of being able to pay it over ; but if a party employs his creditor to receive the amount of a debt from a third person, such creditor has a right to receive and retain the amount as a set-off. Where a mercantile agent is employed to receive money for another, and the course of business is for the agent to keep a running account with his principal, and to credit him with sums(*b*) received by credits in account with the debtors, with whom the agent also keeps running accounts, and not merely with monies actually received, *the rule is*, that where an account is *bonâ fide* settled according to such established usage, the original debtor is discharged, and the agent becomes the debtor. An agent employed to receive or collect debts, without special authority for the purpose, has(*c*) no right to compound debts or submit demands to arbitration, or accept goods in satisfaction of the demand, and an agent authorized to sell houses or lands, has no right to receive payment, unless given by(*d*) the conditions of sale. A wife employed by her husband in receiving and paying money in respect of a shop, the business of which was managed(*e*) by her, cannot bind him by admissions as to the amount of the rent of the premises which she occupied, as such admissions were not necessary for the purposes of the trade, and did not fall within the scope of her authority.

9. Where an order is given by a debtor to a third person to pay a sum of money to his creditor, and that third person refuses to comply, the creditor(*f*) cannot maintain an action against him for the amount ; but though a creditor has a right to insist on payment to himself or his appointee, yet after having once given an order for payment of his debt to a third person, he cannot revoke that order, provided(*g*) the person to whom the authority was given, enters into a binding engagement for payment of the debt according to the authority.

The discharge of a debt is a good consideration for a promise, and it is laid down by(*h*) Buller, J., that if A owes B £100, and B owes C

(*a*) *Barker v. Greenwood*, 2 Yo. & Coll. 414 ; *Howard v. Chapman*, 4 Carr. & P. 508.

(*b*) *Stewart v. Aberdeen*, 4 Mees. & W. 211.

(*c*) *Story's Law of Agency*, 89 ; *Howard v. Chapman*, 4 Carr. & P. 508.

(*d*) *Mynn v. Jolliffe*, 1 Moo. & Rob. 326.

(*e*) *Meredith v. Footner*, 11 Mees. & W. 202.

(*f*) *Williams v. Everett*, 14 East

582 ; *Scott v. Porcher*, 3 Meriv. 652 ; *Fitzgerald v. Stewart*, 2 Sim. 341.

(*g*) *Hodgson v. Anderson*, 3 B. & Cress. 842 ; 5 D. & Ry. 735 ; *Crowfoot v. Gurney*, 9 Bing. 372 ; 2 Moo. & Sc. 473 ; *Barron v. Husband*, 4 B. & Adol. 611 ; 1 Nev. & M. 728.

(*h*) *Tatlock v. Harris*, 3 T. R. 180, by Buller, J. ; *Wilson v. Coupland*, 5 B. & Ald. 228 ; *Fairlie v. Denton*, 8 B. & Cr. 395 ; 2 M. & Ry. 353.

£100, and the three meet, and it is agreed between them that shall pay C the £100, the debt of B is *extinguished*, and C may recover that sum against A. One Lythgoe being indebted to Wharton gave him an order on his(*i*) tenant to pay the amount out of his next rent which should become due: Wharton transmitted the order to the tenant, who, when his next rent became due, produced the order to the landlord, and got credit from him out of his rent for the money, which he then promised to pay to the creditor; but it was ruled that Wharton had no right of action against the tenant, as the debt due by Lythgoe had not been extinguished.

10. The relation of principal and agent may be dissolved(*j*) by revoking the authority conferred on the agent before it has been actually carried into execution, or by the renunciation of the agent, or by a change in the condition of either party, producing incapacity to transact business, such as lunacy, or bankruptcy, or by the death either of the principal or of the agent: however, where a person, who was in the habit of dealing with a tradesman, went abroad, and his wife continued the same course of dealing, it was ruled(*k*) that the wife was not liable for goods supplied to her, after her husband's death, but before any information was received of his death, because the wife had originally received authority from her husband to contract, and had done no wrong in representing that she had a continuing authority.

11. A letter of attorney is an instrument by which a person authorizes another to do certain acts on his behalf, and is usually executed under the hand and seal of the principal, and must be so executed when it confers(*l*) authority on an agent to bind his principal by deed. A letter of attorney is, in general, revocable at pleasure, but where it constitutes part of a security(*m*) for money, or is necessary to give effect to such security, or where it is given for valuable consideration, it cannot be revoked by any act of the principal. An authority derived under a letter of attorney is terminated by the death of the principal(*n*), even though coupled with a pecuniary interest(*o*), because such

(*i*) Wharton *v.* Walker, 4 B. & Cr. 163; 6 D. & Ry. 288; Gaskell *v.* Gaskell, 2 Yo. & Jerv. 510; Cuxon *v.* Chadley, 3 B. & Cr. 591; 5 D. & Ry. 417; Wheeler *v.* Branscombe, 7 Jurist, 1131.

(*j*) Blades *v.* Free, 9 B. & Cr. 167; 4 Mann. & Ry. 282.

(*k*) Smout *v.* Ilberry, 10 Mees. & W. 1.

(*l*) Horsley *v.* Rush, 7 T. R. 209, cited. Co. Litt. 48, B.

(*m*) Walsh *v.* Whitcombe, 2 Espin. N. P. C. 565; Gaussen *v.* Morton, 1 B. & Cress. 731; Bromley *v.* Holland, 7 Vesey, 28.

(*n*) The King *v.* Corporation of Bedford Level, 6 East, 358; Wallace *v.* Cook, 5 Espin. N. P. C. 117.

(*o*) Watson *v.* King, 4 Campb. N. P. C. 272; 1 Stark. N. P. C. 121; Leprieu *v.* Vernon, 2 Vesey & B. 51; but see Story on Agency, 508.

power can only be executed in the name of the principal, which is rendered impossible on his decease; and payment to an agent, or to a creditor acting under a letter of attorney, though purporting to be irrevocable, if made after the decease of the debtor(*p*), is not effectual against his general creditors.

Where an authority is given to two or more persons to do an act, all such persons must concur(*q*) in doing the act, in order to bind the principal: so if a letter of attorney authorize two persons to sell the property of the principal, without words of survivorship, on the death of either, the authority is at an end, and cannot be exercised: and if a letter of attorney be given to three or more persons jointly and severally, the object cannot properly be carried into effect by two of them, but must be done either by one or by all. Where, however, a letter of attorney was given to fifteen persons jointly and separately, for and in the name of the principal, to sign and underwrite such policies of insurance as they or any of them should jointly and separately think proper, it was ruled(*r*) that a policy signed by four of such persons was binding on the principal, as the latter words, by which a discretion was given to "any" of the persons intrusted with the power, controlled the meaning of the former.

12. Payment of part of an ascertained debt, or of part of an arrear of rent, or the acceptance of a security of equal degree with the demand, for a smaller sum of money, does not constitute(*s*) satisfaction of the residue, though the creditor receive the lesser sum in full discharge, and give an acknowledgment in writing for the whole amount claimed: however, payment of part of a debt(*t*) before the time appointed by the original contract, in satisfaction of the whole demand and acceptance by the creditor, or payment of part by a third person out of his own funds(*u*) in satisfaction of the whole, or payment of a stipulated sum in satisfaction of an unliquidated(*v*) demand for pecuniary damages, will be sufficient consideration for exonerating the debtor from the ori-

(*p*) *Mitchell v. Edes*, Prec. in Chan. 125; *Lepard v. Vernon*, 2 Ves. & B. 51.

(*q*) Co. Litt. 112, B., 181, B.; *Moor*, 61, pl. 172; *Withnell v. Gartham*, 6 T. R. 393; 1 Sugd. on Powers, 144.

(*r*) *Guthrie v. Armstrong*, 5 B. & Ald. 628; 1 D. & Ry. 248.

(*s*) *Fitch v. Sutton*, 5 East, 232; 1 Smith's Rep. 415; *Cumher v. Wane*, 1 Stra. 426; 1 Smith's Leading Cases, 146; *Thomas v. Heathorn*, 2 B. & Cr. 477; 3 D. & Ry. 647; *Watters v. Smith*, 2 B. & Ad. 889; *Wright v. Acres*, 6

Ad. & Ell. 726; 1 Nev. & P. 761; *Down v. Hatcher*, 10 Ad. & Ell. 121; 2 P. & Dav. 292; see *ante*, 863.

(*t*) *Pinnel's case*, 5 Rep. 117, A.; *Frederick v. Gosfright*, Carth. 237.

(*u*) *Lewis v. Jones*, 4 B. & Cr. 506; 6 D. & Ry. 567; *Steinman v. Magnus*, 11 East, 390.

(*v*) *Wilkinson v. Byers*, 1 Ad. & Ell. 106; 3 Nev. & M. 853; *Longridge v. Dorville*, 5 B. & Ald. 117; 1 Smith's Leading Cases, 149.

ginal claim. After action brought for recovery of a debt, though the amount be certain and admitted, immediate payment of a sum (less than the amount claimed, is a good consideration for a promise of the plaintiff to pay his own costs, and not to proceed further in the action; the giving up of an action instituted to try a question, respecting the law is doubtful, is a good(x) consideration for a promise to pay a stipulated sum of money, but the mere(y) forbearance to sue is not a sufficient consideration for a promise to pay a specified sum in discharge of the claim.

Under a lease reserving a yearly rent, and also an additional rent by way of penalty, for tilling any part of the premises, the payment of the yearly rent cannot be deemed either a waiver or satisfaction of the penal rent(z), though the landlord was aware of the tenant having been incurred previously to his receipt of the original rent.

13. Acceptance of a security for a smaller sum under a general arrangement entered into by a debtor with a number of creditors, of whom acts on the faith of the engagement of the others, is not binding, because each creditor gets the undertaking of the other for his debt; but the debtor(b) is bound to tender the composition on the day appointed for its payment: and where a debtor compounds with his creditors, and passed his promissory note to one of them for the balance of his demand, which was negotiated and paid, it was held that the debtor might recover the amount from the original creditor, as in an action for money had and received.

Upon the dissolution of a partnership, if the continuing partner undertakes to discharge the debts of the late firm, the mere knowledge that such an arrangement was entered into will not bind a creditor to accept the original firm(d) to accept the sole responsibility of the continuing partner, in exoneration of the joint estate, even though the continuing partner receives interest on his demand from the continuing partner, and the accounts are from time to time furnished to him by the new firm.

(w) *Wilkinson v. Byers*, 1 Ad. & Ell. 106; 3 Nev. & M. 853; *Reynolds v. Pinhowe*, Cro. Eliz. 429; *Moor*, 412; and see *Henry v. Earl*, 8 Mees. & W. 228.

(x) *Longridge v. Dorville*, 5 B. & Ald. 117.

(y) *Edwards v. Baugh*, 11 Mees. & W. 641.

(z) *Denton v. Richmond*, 3 Tyrw. 630; 2 Cro. & M. 734.

(a) *Reay v. White*, 3 Tyrw. 596; 1 Cro. & M. 748; *Knight v. Hunt*, 5

Bing. 432; 3 Moo. & P. 18; 7 *Courtenay*, 1 B. & Ald. 1; *Co. Bennett*, 2 T. R. 763.

(b) *Cranley v. Hillary*, 2 M. 120.

(c) *Smith v. Cuff*, 6 M. & W. 120; *Horton v. Riley*, 11 Mees. & W. 641.

(d) *Kirwan v. Kirwan*, 4 T. R. 232; 2 Cro. & Mees. 616; *Thompson v. Parr*, 5 B. & Adol. 925; 3 M. & W. 167; and see *Parr, ex parte*, Ch. 426.

ty, in the form of a bill of exchange taken by the creditor continuing partner(*e*) was held to operate as satisfaction of a debt due by the late firm, because many cases might occur in which the sole liability of one of the debtors might be more beneficial than the joint liability of both; and in like manner, an agreement by a retiring partner to accept the responsibility of a new firm with new partners, in consideration of sufficient consideration to discharge the retiring partner from liability.

A receipt acknowledging payment of a debt, or of an arrear of a debt, is prima facie evidence(*f*), and may be shewn to have been given by fraud, or given by mistake, but a release of the demand, once given, can only be avoided(*g*) by a Court of Equity: a defendant cannot, however, be restrained by a court of law from setting up(*h*) a defence founded on fraud, or collusively, from one of the plaintiffs in a bill, or a court of law will order a release to be given up to be set aside if it was fraudulently executed by a tenant for the purpose of defeating proceedings, either(*i*) instituted, or defended(*j*) in his name as landlord. A release to one of several joint covenantors, or joint obligors, operates as a discharge of all the others, though the obligor is joint and several, being in law a satisfaction of the entire debt. The legal operation of the instrument may be restrained by stipulations, as if it contain a proviso(*l*) that the party shall be deprived of any remedy which he otherwise would have had against the other debtors.

A partner indebted to a partnership may, after notice of its dissolution to either of the partners, and the partner receiving the money(*m*) in satisfaction of the debt, refuse to give a valid legal discharge; but if one of the partners has an exclusive right in equity to the demand, after notice of such

Hipson v. Perceval, 5 B. & C. 3 Nev. & M. 167.
Le v. Jackson, 3 B. & Cr. 100 & Ry. 290; *Graves v. Key*, 11 B. & C. 313.
Le v. Dewey, 1 B. & Cress. 100 & Ry. 99.
Le v. Stephen v. Brooke, 1 Chit. 1; *Barker v. Richardson*, 1 B. & C. 362; *Legh v. Legh*, 1 Bos. & P. 104; and see *Phillips v. Clagett*, 11 B. & C. 84.
Le v. Burt, 7 Taunt. 48; *Le v. Rogers*, 1 Doug. 407; 1 Bos. & P. 104.
Le v. Locke v. Franklin, 7

(*k*) *Nicolson v. Revell*, 6 Nev. & M. 192; 4 Ad. & Ell. 675; *Cocks v. Nash*, 9 Bing. 341; 4 Moo. & Sc. 162; *Brooks v. Stuart*, 9 Ad. & Ell. 854; *Cheetham v. Ward*, 1 Bos. & P. 630; Year Book, 21 Edw. IV. fo. 81, plac. 33; Co. Litt. 232, A. and note 144, from Lord Nottingham's MSS.; 2 Ro. Abr. Release, fo. 410, pl. 1, D.

(*l*) *Solly v. Forbes*, 2 Brod. & B. 48; 4 Moore, 448; *Twopenny v. Young*, 3 B. & Cr. 211; 5 D. & Ry. 259; *Lancaster v. Harrison*, 6 Bing. 726; 4 Moo. & P. 561.

(*m*) *Duff v. East India Co.*, 15 Vesey, 213; *Bristow v. Taylor*, 2 Stark. N. P. C. 50.

right to the debtor, the equitable owner cannot be affected by payment to the other partner.

15. Money cannot be recovered back which has been paid under compulsion(*n*) of legal process, or under threat(*o*) of suit, unless obtained by imposition, extortion, or fraudulent(*p*) practices, or unpaid for the purpose(*q*) of redeeming, or preserving one's person or goods; nor can money be recovered back which has been paid on a *bonâ fide*(*r*) claim of right(*s*), with full knowledge and recollection of the facts, although such payment was made through ignorance(*t*) of the law on the subject; nor where the transaction was of an illegal(*u*) character, and the parties stood *in pari delicto*; nor where the money paid was due in honour and conscience(*v*), though not legally recoverable; however, where payment is made without consideration(*w*), or on consideration which fails, or in consequence(*x*) of mistake or misrepresentation of facts, or merely through mistake(*y*) occurring in the hurry of business, or through(*z*) forgetfulness, the amount may be recovered back again: and if a trustee make over-payments to his *cestui que* trust, he may(*a*) reimburse himself out of the trust-fund.

16. Any writing acknowledging payment, or satisfaction of a debt, or demand amounting to, or exceeding five pounds, is to be deemed a receipt within the meaning of the Stamp Acts(*b*), which must be impressed with a stamp in proportion to the value for which it is passed and the exemptions allowed, include letters by the general post acknowledging the safe arrival of any bills of exchange, promissory

(*n*) *Marriott v. Hampton*, 7 T. R. 269; *Hamlet v. Richardson*, 9 Bing. 644; 2 Moo. & Sc. 811; *Belcher v. Mills*, 5 Tyrw. 715; 2 Cro. M. & Rosc. 150; *Wilson v. Ray*, 10 Ad. & Ell. 82; 2 P. & Dav. 253; *Gower v. Popkin*, 2 Stark. N. P. C. 85.

(*o*) *Knibbs v. Hall*, 1 Espin. N. P. C. 84; *Brown v. M'Kinally*, 1 Espin. N. P. C. 279.

(*p*) *The Duke de Cadaval v. Collins*, 4 Ad. & Ell. 858; 6 Nev. & M. 324; *Dew v. Parsons*, 2 B. & Ald. 562.

(*q*) *Fulham v. Down*, 6 Espin. N. P. C. 26; note cited by Patteson, J., 4 Ad. & Ell. 862.

(*r*) *Brisbane v. Dacres*, 5 Taunt. 143; *Milnes v. Duncan*, 6 B. & Cr. 671; 9 D. & Ry. 731; *Skyring v. Greenwood*, 4 B. & Cr. 281; 6 D. & Ry. 401; *Bramston v. Robins*, 4 Bing. 11; 12 Moo. 68; *Waller v. Andrew*, 3 Mees. & W. 312; *Magennis v. Ramage*, 1 Cr. & D. Circ. Ca. 87.

(*s*) Le code civil des Français, l. 1376, 1377, 1378; see Appendix, l. 16.

(*t*) *Bilbie v. Lumley*, 2 East, 46; *Brisbane v. Dacres*, 5 Taunt. 143; 1 see *Monypenny v. Bristow*, 2 Russ. My. 117; 2 Pothier on Contracts, Evans, 379.

(*u*) *Browning v. Morris*, 2 Cow 790.

(*v*) *Farmer v. Arundel*, 2 W. B. 824; 1 Selw. N. P. 85.

(*w*) *Jaques v. Withy*, 1 H. Bla. 65.

(*x*) *Milnes v. Duncan*, 6 B. & Cr. 671; 4 D. & Ry. 731; *Smith v. Alsop*, 1 M'Clell. 622; 13 Price, 823.

(*y*) *Lucas v. Worswick*, 1 Moo. Rob. 293.

(*z*) *Kelly v. Solari*, 7 Mees. & W. 54.

(*a*) *Livesey v. Livesey*, 3 Russ. 282.

(*b*) 56 Geo. III. c. 56, Irish; 3 & 4 Will. IV. c. 23; 5 & 6 Vict. c. 38, English and Irish.

notes, or other securities for money, as well as receipts or discharges, endorsed or otherwise written upon, or contained in any bond, mortgage, or other security, or any conveyance, deed, or instrument whatever, duly stamped, acknowledging the receipt of the consideration money, or the receipt of any principal money, interest, or annuity thereby secured, or receipts or discharges written upon promissory notes, bills of exchange, drafts, or orders for payment of money duly stamped, or upon bills of exchange drawn out of, but payable in Ireland.

Acknowledgements written on unstamped paper, at successive times, upon payment of money, cannot be received in evidence for want of a stamp, but an account current(c) is admissible without any stamp, for there the sums stated to be received are not entered in the account at and upon their receipt, and only amount to admissions of money paid at antecedent periods; and upon the same principle, a written acknowledgement at foot of an account current(d) stating its correctness, does not require a stamp, though the production of such a document renders the whole of it evidence(e), as well the debit as the credit side, for the other party: an unstamped receipt, though not admissible in evidence, may be exhibited(f) to a witness, as a memorandum by him, for the purpose of refreshing his memory as to the fact of payment. A receipt given in satisfaction of all a(g) party's claims for a certain period, or for what he has done for his employer(h), does not require the stamp which should be imposed on a receipt in full of all demands.

(c) *Wright v. Shawcross*, 2 B. & Ald. 502, note.

(d) *Wellard v. Moss*, 1 Bing. 134; 7 Moore, 503; *Jacob v. Lindsay*, 1 East, 400.

(e) *Boardman v. Jackson*, 2 Ball & B. 382; *Randle v. Blackburn*, 5 Taunt. 245; *Carter v. Lord Coleraine*, Barnard. Chan. Rep. 126; *Rose v. Sa-*

vory, 2 Bing. N. C. 145; 2 Scott, 199.

(f) *Rambert v. Cohen*, 4 Espin. N. P. C. 213; *Maugham v. Hubbard*, 8 B. & Cress. 14; 2 M. & Ry. 5; and see *Trentham v. Deverill*, 3 Bing. N. C. 397; 4 Scott, 128.

(g) *Dibdin v. Morris*, 2 Carr & P. 44.

(h) *Law v. Gunly*, 4 Carr. & P. 149.

CHAPTER XIV.

PAYMENT.

APPROPRIATION OF PAYMENTS.

17. *Debtor may appropriate Payments.*
18. *Rules of the civil Law on the Subject.*
19. *Omission by Debtor to appropriate, enables Creditor to do so.*
20. *Unappropriated Payments must be applied to legal, in Preference to equitable Demands.*
21. *And to Debts due by a Party in his own Right, and not in alio jure.*
22. *Partnership Money must be applied to Partnership Debts.*
23. *Payments applied according to Priority of Obligations.*
24. *Bankers may apply Payments to a Customer's Credit, not knowing he was only Trustee.*
25. *Surety not to be prejudiced by the Appropriation of the Creditor.*
26. *Appropriation by Elegit C.*
27. *Payments made by Anticipation.*

INTERPLEADER.

28. *Remedy in Equity by interpleader Suit.*
29. *— only lies where Plaintiff has no Interest in the Subject.*
30. *Nature of conflicting Demands.*
31. *On Interpleader by Tenant: Rent must be claimed by Tenant in Privity of Tenure.*
32. *Conflicting Claims must arise under the Landlord's Acts, subsequent to the Demise.*
33. *— must decide all the Rights of the Claimants in respect of the Fund.*
34. *Procedure in interpleading.*

17. A PERSON who owes several distinct debts to the same individual, has a right to direct any sum of money which he pays to a creditor, to be appropriated to which account(*b*) he pleases, such application being not expressed(*c*) by the debtor *at the time of payment*, or if his intention cannot be reasonably inferred(*d*) from the circumstances of the transaction, then the creditor receiving the money acquires a right of appropriating the amount to whichever debt he thinks fit. The creditor, however, is not required to make an immediate allocation of the payment, but is allowed(*e*) a reasonable time for that purpose, nor will he be concluded by an entry made(*f*) in his account-books, specifying the mode of appropriation, unless communicated to the debtor.

18. According to the rules of the civil law, the election was

- (*a*) See Appendix, No. 17.
- (*b*) Clayton's case, 1 Meriv. 572.
- (*c*) Campbell v. Hodgson, Gow's N. P. C. 74; and the note. Plomer v. Long, 1 Stark. N. P. C. 153, and the note.
- (*d*) Clayton's case, 1 Meriv. 608; Shaw v. Picton, 4 B. & Cress. 715; 7 Dowl. & Ry. 201, S. C.; Field v. Carr, 5 Bing. 13; 2 Moore & P. 46, S. C.; Newmarch v. Clay, 14 East, 239; v. Anderson, 5 Taunt. 603; 1 B. & Ald. 238.
- (*e*) Philpott v. Jones, 4 Nev. 16; 2 Ad. & Ell. 41; Hankey v. Peake's Adl. Cases, 107.
- (*f*) Simson v. Ingham, 2 B. & Ald. 65-73; 3 Dowl. & Ry. 549, S. C.

made at the time(*g*) of payment, as well in the case of the creditor, as of the debtor, and if neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred: and as it was the actual intention of the debtor, that would, in the first instance, have governed, so it was his presumeable intention that was first resorted to, as the rule by which the application was to be determined: in the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor: the payment was consequently applied to the most burthensome debt—to one that carried interest rather than to that which carried none,—to one secured by a penalty rather than to that which rested on a simple stipulation,—and if the debts were of equal degree, then to that which had been first contracted.

19. If the debtor omit, in the first instance, to appropriate his payment to a specific demand, the creditor has a right to make the appropriation(*h*) at any time before action brought, and, according to the law of England, may apply such payment in discharge of debts due(*i*) for a period exceeding six years, in preference to more recent demands, or may appropriate the(*j*) payment to a debt which he was prevented by Statute from recovering by action.

A person being indebted to plaintiff's testator by mortgage, and also by bond, a question arose whether a payment of £100 should be applied in discharge of the principal and interest due on the bond, or to pay merely the interest on the mortgage; and as it appeared that an entry was made by the testator in a pocket-book, about a fortnight after the receipt of the money, applying the amount towards payment of the interest on the mortgage debt, Lord Hardwicke(*k*) said that a person indebted by mortgage and by bond, paying money to his creditor, must declare to which debt he intended to apply the money at the very time of payment, and cannot make the application afterwards, but that his creditor may make the application *at any time*

(*g*) Clayton's case, 1 Meriv. 605, by Sir W. Grant; 1 Pothier on Contracts, by Evans, 368; *quoties quis debitor ex pluribus causis, unum solvit debitum, est in arbitrio solventis, dicere quod potius debitum voluerit solutum: quoties vero non dicimus id quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat*; Digest. lib. 46, tit. 3, de Solutionibus.

(*h*) Mills v. Fowkes, 5 Bing. N. C. 455; 7 Scott, 444; Simpson v. Ingham,

2 B. & Cr. 65; 3 D. & Ry. 549, S. C.

(*i*) Williams v. Griffith, 5 Mees. & W. 300; Mills v. Fowkes, 5 Bing. New C. 455; 7 Scott, 544; Arnold v. The Mayor of Poole, 4 Mann. & Gr. 860.

(*j*) Philpott v. Jones, 4 Nev. & M. 16; 2 Ad. & Ell. 41; Cruickshanks v. Rose, 1 Moo. & Rob. 100; 5 Car. & P. 19, S. C.; Biggs v. Dwight, 1 Mann. & Ry. 308.

(*k*) Wilkinson v. Sterne, 9 Mod. 427.

before an account settled between them, and the entry in the book was held to be admissible evidence of the appropriation in the testator. A widow, who was indebted as executrix of her first husband, and also on her own account after his death, *dum sola*, plaintiff, having afterwards married a second husband, who abstracted a debt to the plaintiff, and made general payments on account, it was decided(*l*) that as the second husband neglected to appropriate such payments, the creditor had a right to apply them as he pleased either to the wife's debt, incurred *dum sola*, or to the husband's debt, but not to the debt due by the wife in her representative capacity, which depended on the due administration of the testator's estate. Where a person is indebted both by specialty and simple contract, and general payments, unappropriated by the debtor, may be applied by the creditor in discharge of the debt which he considers worse secured, but such payments must be applied to a debt(*n*) subsisting at the time, in preference to a balance of account subsequently accruing due.

20. If a person has two demands, one of which is recognized by law, and the other arising on a matter forbidden by law, and an appropriated payment(*o*) be made, the law will apply the payment to the demand which it acknowledges, and not to the demand which is prohibited: if a legal debt exists, and also a demand which would become such on the adjustment of a partnership account and so forth, a balance(*p*), an indefinite payment must be applied to the *prior* debt, and not to the subsequent equitable demand, but in a form which it was ruled(*q*) that a creditor receiving money without any appropriation by the debtor, would be permitted at law to ascribe the receipt to the discharge of a *prior* and purely equitable demand, and might sue the debtor for the subsequent legal debt.

21. Unappropriated payments must be applied by the creditor to any debt due by the party on his own account, in preference to a demand for which he was only answerable(*r*) in a representative character, or which was only claimed by the creditor *alio jure*, as this(*s*)

(*l*) *Goddard v. Cox*, 2 Stra. 1194.

(*m*) *Chitty v. Naish*, 2 Dowl. Pr. C. 511; *Peters v. Anderson*, 5 Taunt. 596; 1 Marsh. 238, S. C.; *Newmarch v. Clay*, 14 East, 239; *Brazier v. Bryant*, 2 Dowl. Pr. C. 477; but see *Sloane v. Mahon*, 1 Dr. & Walsh, 189.

(*n*) *Hammersley v. Knowlys*, 2 Espin. N. P. C. 666; *Birch v. Tebbutt*, 2 Stark. N. P. C. 74.

(*o*) *Wright v. Laing*, 3 B. & Cr. 165; 4 D. & Ry. 683; S. C.; *Randleson, ex*

parte, 2 Deac. & Ch. 534.

(*p*) *Goddard v. Hodges*, 3 Dowl. Pr. C. 209; 1 Cro. & Mees. 33; *Birch v. Tebbutt*, 2 Stark. N. P. C. 74.

(*q*) *Bosanquet v. Wray*, 6 Taunt. 2 Marsh. 319, recognized in *Fowkes*, 5 Bing. New C. 462, 10 D. & Ry. 100, 10 C. J.

(*r*) *Goddard v. Cox*, 2 Stra. 1194.

(*s*) *Nottidge v. Prichard*, 8 Dowl. Pr. C. 521; 2 Cl. & Finn. 39.

time of appropriation never has been extended to cases where the parties claim *diversis juribus*.

22. When one distinct demand exists against persons in partnership, and another against one only of the partners, if the money paid belong to the partnership, the creditor is not at liberty to apply it to the debt of the individual partner, for that would be allowing(*t*) the creditor to pay the debt of one person with the money of others.

23. If there be a dealing with a partnership(*tt*), and debts are incurred, and a subsequent payment is made, and nothing passes at the time of such payment, nor any instructions are given how it is to be applied, the law presumes the priority of obligation prevails, but the intention of the debtor may be inferred from the circumstances(*u*) of the particular transaction, which will, in many instances, govern the mode of appropriation.

When one of several partners dies, and the original partnership is in debt, and the surviving partners continue their dealings with a particular creditor(*v*), who unites the transactions of the old and new firm, which are blended in one entire account, then the payments made from time to time by the surviving partners must be applied to the earlier debt: and upon the same principle, payments made by a debtor to the surviving partners of a firm, from time to time, upon one general(*w*) account, including a debt due to the prior partnership, will, in the absence of any specific appropriation, be applicable, in the first instance, to discharge the earliest debt. The rule laid down by Lord Lyndhurst(*x*) on this subject is, that if there be a current account between a banking-house and their customer, and there be no appropriation by either party, the law will make an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged, or reduced by the first item on the credit side. Where two accounts were formed by a London(*y*) bank-

(*t*) *Thompson v. Brown*, Moo. & Malk. 40.

(*tt*) *Nottidge v. Prichard*, 8 Bligh's Parl. C. 520; *Clayton's case*, 1 Meriv. 608; *Dawe v. Holdsworth*, Peake's N. P. C. 64; *Graves v. Hughes*, 4 Madd. 381.

(*u*) *Waters v. Tompkins*, Tyrw. & Gr. 137-144; 2 Cro. M. & Rosc. 723-726; *Marryatts v. White*, 2 Stark. 101; *Peters v. Anderson*, 5 Taunt. 596-603; *Shaw v. Picton*, 4 B. & Cress. 715; 7 D. & Ry. 201.

(*v*) *Simson v. Ingham*, 2 B. & Cress. 72, by Bayley, J.; 3 D. & Ry. 549, S.

C.; *Clayton's case*, 1 Meriv. 608; *Williams v. Rawlinson*, 3 Bing. 71; 10 Moore, 362; *Smith v. Wigley*, 3 Moore & Sc. 174.

(*w*) *Bodenham v. Purchas*, 2 B. & Ald. 39; *Brooke v. Enderby*, 2 Brod. & B. 70; 4 Moore, 501; *Field v. Carr*, 5 Bing. 13; 2 M. & Payne, 46; *Lord Arlington v. Meyricke*, 2 Saund. 415, addl. note C.; *Toulmin v. Copland*, 3 Younge & Coll. 625.

(*x*) *Pemberton v. Oakes*, 4 Russ. 154; *Sterndale v. Hankinson*, 1 Simons, 400.

(*y*) *Simson v. Ingham*, 2 B. & Cr. 65; 3 D. & Ry. 149, S. C.

ing-house on the death of one of the partners in a country bank which dealt with them, the one styled the old account, and the other the new account, and in the latter entered all the payments made to them by the surviving partners of the country bank, after the death of their late partner, so that a distinct appropriation was made, it was decided that the London firm had a right to apply the payments made by the surviving partners, exclusively to the new account.

24. A person who kept a running account with bankers, remitted them a bill of exchange for £1000, without intimating for what purpose it was intended, and upon the customer's death(*z*) it appeared that this sum was the property of another person, but as the bankers had no notice of that circumstance, it was held they were justifiable in placing the amount of the bill to their customer's credit.

25. A surety is not to be charged beyond the express words of his engagement(*a*), and his rights cannot be prejudiced by any appropriation of payments made by the creditor against his debtor, to which the undertaking of the surety does not extend. An agent having furnished an account, in which he charged himself with a balance, continued afterwards to receive(*b*) monies for his principal, and it was decided that payments subsequently made by the agent to his principal were not necessarily to be applied to the extinction of the earlier balance; and even in an action against a surety on a guarantie, the accounts of the agent might be so framed as to warrant a jury in finding that the subsequent payments were not made on account of the previous balance, as there is no inflexible rule which necessarily requires(*c*) subsequent payments to be applied in discharge of the first items of an account, where different interests are concerned, but they may be appropriated according to equity. Where, however, a bond was executed by a surety, conditioned for payment of advances thereafter to be made, and no notice was given(*d*) to the surety before entering into the obligation, that any prior debt was then due by the principal, it was held that the obligee had a right as against the surety to appropriate subsequent payments by the principal in discharge of such prior demands.

26. A creditor in possession of lands under a writ of *elegit* is bound to apply the rents in discharge of the judgement by virtue of which he

(*z*) *Grigg v. Cocks*, 4 Simons, 438.

(*a*) *Parr v. Howlin*, Alc. & Nap. 197; *Marryatts v. White*, 2 Stark. N. P. C. 101.

(*b*) *Lysaght v. Walker*, 5 Bligh's P. C. 28; 2 Dow. & Cl. 211-229.

(*c*) *Stone v. Seymour*, 15 Wendell's Amer. Repr. 19.

(*d*) *Kirby v. The Duke of Marlborough*, 2 M. & Selw. 18; *Williams v. Rawlinson*, 3 Bing. 71; 10 Moore, 362; Ry. & Moo. 233, S. C.

entered, until such demand(*e*) shall be fully satisfied, and he has no right to apply any portion of the rents to keep down the interest of subsequent judgement debts, either previously in arrear, or accruing due to the creditor in the meantime, but he is not chargeable for wilful default in permitting the owner(*f*) of the property to receive part of the rents, before any other creditor has filed a bill in equity for recovery of his demand.

A mortgagee is not entitled to an account of bygone rents(*g*) against the mortgagor, but a bill filed by an equitable encumbrancer, for payment of his demand, is equitable possession, and after the filing of such a bill by a *puisne* creditor, a prior(*h*) encumbrancer in possession is not justified in paying the surplus rents to his debtor.

By the Statute(*i*) 5 & 6 Will. IV. c. 55, it is enacted, that it shall be lawful for any person entitled to sue out, or who has already sued out a writ of *elegit* upon any judgement recovered in any of the superior courts, or (entitled) to issue, or who has issued execution on any recognizance, to apply by petition to the Court of Chancery, or Exchequer, for an order that a receiver may be appointed of the rents and profits of the entire of all lands, tenements, or hereditaments, or a competent part thereof, which he would be entitled to have extended under a writ of *elegit* on such judgement, or other proceeding on such recognizance, or to have a receiver thereof appointed by that court extended to that matter: and the court is authorized to extend the receiver from the matter of the petition of one creditor, to the matter of the petition of any other, or others; and to order the rents and profits to be applied according to the priority of each(*j*): and that in every order made for the appointment of a receiver, the tenants shall be required to pay him all rents due, or which shall become due by them, for the lands mentioned in such order(*k*): and in case any sum shall be received by any such receiver before an order shall be made to extend him to the matter of another petition, the money so received shall be distributed and paid under the orders of the Court, as it would have been if such further order extending him had not been made, but in distributing the funds thereafter to be received, the Court shall have re-

(*e*) *Skirrett v. Athy*, 1 Ball. & B. 430.

(*f*) *Holton v. Lloyd*, 1 Moll. 30.

(*g*) *Wilson, ex parte*, 2 Ves. & B. 252; *Gresley v. Adderley*, 1 Swa. 579; *Colman v. The Duke of St. Albans*, 3 Vesey, 28.

(*h*) *Parker v. Calcraft*, 6 Madd. 11.

(*i*) 5 & 6 Will. IV. c. 55, s. 31, Ir.; 3 & 4 Vict. c. 105, s. 21, Irish; there are no corresponding English enactments.

(*j*) Section 32.

(*k*) Section 33.

gard to the rights of the person or persons at whose instance the receiver was made(*l*).

The preceding Statute directs that the receiver shall collate arrears of rent due at the time of his appointment, as well as subsequently becoming due, in consequence(*m*) of the confusion must ensue if there should be two receivers at the same time does not declare that the prior arrear shall be applied in payment of the petitioning creditor's debt, and does not give any greater priority than a judgement-creditor issuing his *elegit* would at law be entitled to : the judgement-creditor only acquired a title at law to the rents falling due(*n*) after he had obtained a finding on his *elegit*, and proceeding under this Act he can only get the rents which accrued after the order for the appointment of the receiver, and the debtor has a right to be paid the prior arrear, on his application to the Court for that purpose. In like manner, upon the extension of a receiver in the matter of a prior judgement, the *puisne* creditor is entitled to the rents which accrued due prior to the extending order, although not collected by the receiver until afterwards. This Act, though it provides distinctly for the administration of rents between conflicting judgement creditors, is silent with respect to the claims(*o*) of mortgagees or specific encumbrancers coming into conflict with the rights of judgement-creditors : and if a prior mortgagee file his bill of foreclosure, a *puisne* creditor, who has obtained a receiver, cannot be deprived of the rents, or made accountable for them until the receiver is extended to the mortgage cause.

27. Rent reserved by lease is not due, or payable before the appointed days of payment, because it is to be rendered and restored to the lessor out of the issues and profits of the land : and if the lessee pay his rent to the lessor before the appointed day(*p*), and get his acquittance, and the lessor demand the money on the day when the rent becomes due, and it is not paid, the(*q*) condition is broken, for payment before the day is not a discharge, being made before breach, and the rent

(*l*) Section 38.

(*m*) *Ld. Sligo v. O'Malley*, 3 Irish Eq. Rep. 527; *Coleman v. Mason*, 4 Irish Eq. Rep. 421; *Rule v. Henry*, Flan. & K. 97; *Morrogh v. Hoare*, 5 Irish Eq. Rep. 195; *Carey v. M'Dermott*, 5 Irish Eq. Rep. 209.

(*n*) *Sharp v. Key*, 8 Mees. & W. 379; 9 Dowl. Pr. Ca. 770.

(*o*) *Morrogh v. Hoare*, 5 Irish Eq. Rep. 195; and see *Thomas v. Brig-*

stocke, 4 Russ. 64; *Ld. Lis Chamley*, Hayes, 329; *Rundell v. Wellesley*, 3 Moll. 116.

(*p*) *Clun's case*, 10 Rep. 128, Litt. 315, A.; *Fuller's case*, 4 pl. 16; *Littleton v. Pernes*, 1 L. pl. 186.

(*q*) *Ld. Cromwell v. Andrew*, El. 15; *Kaye v. Waghorn*, 428.

(*r*) *Hamm*. N. P. 387; and

only of a sum in gross, while the rent is something *real*. It frequently occurs that a tenant, for the purpose of accommodating his landlord, accepts a bill of exchange for the amount of an accruing gale of rent, payable shortly after such rent falls due, and takes a receipt, to be applied as a discharge for the rent, when such gale-day arrives: an authority given by the landlord to his tenant to retain or apply the accruing rent in discharge of a debt, is binding on the landlord, his heirs, and personal representatives; but a prospective receipt given to the tenant merely confers a specific lien on the rent when it falls due, and cannot interfere with the demand of a creditor by a specific security, of higher degree, affecting the lands. It is established by the law(s) of Scotland that the rent which comes in place of the crop belongs to the owner of the estate, and if it be paid prior to the stipulated gale-days, and the estate be sold or be attached by creditors, the new proprietor or purchaser is entitled to the rent from the time of his entry, notwithstanding any previous prospective discharge given by the former owner. A tenant paying his rent in advance not only incurs the risk of being obliged to pay it over again to a receiver(t) appointed at the suit of a creditor before the rent-day, but, in case of his landlord's death, the tenant may be compelled to pay the remainder-man, or reversioner, a proportion of the rent for the current gale by force of(u) the Apportionment Act.

28. Where two or more persons claim the same(v) debt or duty, or the same property, by different titles, from another person who does not claim any interest in the subject himself, and is in danger of suffering injury from his ignorance to which of the claimants he should pay the demand, or deliver the property, courts of equity exercise a jurisdiction for his protection, by means of a bill of interpleader, the object of which is to compel the claimants to adjust their own rights, so as to enable the Court to decide which of them is entitled, and to relieve the plaintiff, or stake-holder, from further embarrassment: the true source of the equitable interposition arises from the inadequacy of the relief which can be afforded at law for the purpose of protecting an(w) innocent party from the vexatious litigation in which he would be involved by adverse claims.

29. A bill of interpleader can only be sustained where the plaintiff

idge v. Manners, 3 Campb. N. P. C.

4.

(s) Bell on Leases, vol. i. page 227;
Code Civil de France, No. 1753,
pendix, No. 24.

(t) 5 & 6 Will. IV. c. 55, Irish.

(u) 4 & 5 Will. IV. c. 22, English and
Irish.

(v) Ld. Redesdale's Treatise, 141.

(w) Angell v. Hadden, 15 Vesey, 244.

is in the condition of a stake-holder, admitting a title against(*x*) himself in all the defendants, and not asserting(*y*) any interest in himself in the subject of dispute; as a person cannot file a bill of this nature who is obliged to admit, that as to some(*z*) of the defendants he is wrong-doer, and the case must be such that the litigation between(*a*) those parties will decide all their respective rights with respect to the fund: if an action be brought against an auctioneer for a deposit & the sale of an estate, an interpleading bill will not lie if the auctioneer insists on retaining either commission or duty, because(*b*) he then raises a personal question with the purchaser, and does not stand wholly indifferent between the parties.

30. It is not requisite that an action should be brought against the party, in order to warrant an interpleading suit, if he has got notice of a variety of claims(*c*), in consequence of a demand affecting his estate being split or divided amongst several persons, and he incurs the risk of being molested by conflicting demands. Several sets of annuitants having distrained the farm of a tenant, upon a bill of interpleader and bringing the rents of the farm into court, the annuitants were ordered(*d*) to interplead, and it was referred to the Master to ascertain their priorities: so an entire rent-charge having been granted, which was split into several parts by the owners, the several persons(*e*) claiming the different parts were restrained by injunction from proceeding by distress, as the owner of the land charged, who was entitled to be discharged by a single payment, ought not to be harassed by a number of suits. It is not necessary that the demands of the claimants should be purely legal, as it is sufficient to found the jurisdiction that one(*f*) title is legal and the other is equitable, or even that the demands(*g*) of all the claimants should be merely equitable.

31. Where a tenant is liable to pay rent, and several persons claim title to it in privity of contract or of tenure, an interpleading bill may

(*x*) *Slingsby v. Boulton*, 1 Ves. & B. 334; *Morgan v. Marsack*, 2 Meriv. 107-110.

(*y*) *Moore v. Usher*, 7 Simons, 383; *Mitchell v. Hayne*, 2 Sim. & St. 63.

(*z*) *Slingsby v. Boulton*, 1 Ves. & B. 334.

(*a*) *Hoggart v. Cutts, Craig & Ph.* 197.

(*b*) *Mitchell v. Hayne*, 2 Sim. & St. 63; *Bignold v. Audland*, 11 Sim. 23.

(*c*) *Angell v. Hadden*, 15 Vesey, 244; *Duke of Bolton v. Williams*, 2 Ves. J. 138; 4 Bro. Cha. Ca. 297, S. C.; *Lang-*

ston v. Boylston, 2 Ves. Jun. 107; *Glyn v. Locke*, 3 Dru. & Warr. 11.

(*d*) *Aldridge v. Thompson*, 2 Bro. Cha. C. 149.

(*e*) *Angell v. Hadden*, 15 Ves. 244.

(*f*) *Paris v. Gilham*, Coop. Eq. Rep. 56; *Morgan v. Marsack*, 2 Meriv. 107; *Wright v. Ward*, 4 Russ. 215; *Lowndes v. Cornford*, 18 Vesey, 299.

(*g*) *Crawford v. Fisher*, 10 Simons, 479; *Angell v. Hadden*, 15 Vesey, 247; but see *Barclay v. Curtis*, 9 Price, 661; 2 Story's Comm. 116.

d to compel them to ascertain to whom it is(*h*) payable, but it is shewn that the same rent is claimed in privity of contract, or, as in the case of mortgagor and mortgagee, trustee and cestuique trust, or where the estate has been settled to the separate use of a married woman, of which the tenant has notice, and the husband is in receipt(*i*) of the rent, which is afterwards demanded by the landlord, in such cases the tenant does not controvert his landlord's title, but to the contrary, affirms that title, the tenure, and the contract by which the rent is payable, and relies on the uncertainty of the individual to whom it is to be paid: a bill of interpleader only lies where two persons demand from a third person the same debt or the same thing, but if a stranger claim the land by title paramount(*j*) discharged by a lease, and not merely the rent reserved by the lease, there the tenant cannot compel his landlord to interplead with such adverse claimant, as the demands are neither of the same nature, nor in the same right. A tenant, generally speaking, has no right to call upon his landlord, or upon one whom he has acknowledged as such, to interplead with a stranger(*k*) or other party claiming title against him; but it is an established rule that, upon his lessor's death, a tenant may sue upon the party claiming the rent to prove his title, and that the tenant is not precluded from(*l*) so doing by the circumstance of his having paid rent to such party, and having done acts which, under the circumstances, might amount to an attornment.

Where a tenant holds by demise from an owner of the equity of redemption in mortgaged premises, or from a *cestuique* trust in possession, he cannot compel his landlord to interplead with the mortgagee or trustee, because they derive by title paramount to the demise, and are enough entitled to recover possession by ejectment, they have no right to enforce payment of the reserved rent; but an interpleading suit is maintainable by a tenant against his landlord, where the question arises from any act(*m*) of the landlord, or from any conflicting claims to the rent arising by his means, subsequently to the demise. A vicar, who had demised his tithes at a yearly rent, being discharged(*n*) under an Act, a bill of interpleader was sustained by the lessee against

Dungey v. Angove, 2 Vesey, Jun.

Wood v. Kaye, cited 2 Ves. 305;
v. Belbee, 6 Madd. 28.

Homan v. Moore, 4 Price, 6;
n v. Atkinson, 3 Anst. 798;
son v. Knowles, 5 Madd. 47;
ay v. Thornton, 3 Mylne & Cr. 1.

(*k*) *Hall v. Butler*, 10 Ad. & Ell. 204;
2 P. & Dav. 274, S. C.; *Townley v.*
Deare, 3 Beav. 213.

(*l*) *Jew v. Wood*, Craig & Phill.
185; 3 Beavan, 579, S. C.

(*m*) *Cowtan v. Williams*, 9 Ves. 107;
Clarke v. Byne, 13 Vesey, 383.

(*n*) *Cowtan v. Williams*, 9 Ves. 107;

the vicar and his assignees, as both of them set up a claim to the rent. So after a lessor's decease, the lessee(*o*) may sustain an interpleader suit against the heir at law, and a person claiming as devisee of the landlord. Where two persons claim the rent of demised premises, neither of whom has been recognized(*p*) by the tenant as his landlord, a bill of interpleader lies for the purpose of ascertaining to which of the claimants the rent is to be paid. If the priority of the titles of the different claimants to the rent of demised premises be not incompatible with each other, and it appears(*q*) clearly on the bill or answers, what order they are to be paid, there is no ground for interpleader.

33. The case tendered by every bill of interpleader ought to be, that the whole of the rights(*r*) claimed by the defendants may be properly determined by litigation between them, and that the plaintiff is not under any liability to either of the defendants beyond those which arise from the title to the property in contest, because if the plaintiff has come under any personal obligation, independently of the question of property, so that either of the defendants may recover against him at law, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiff: and the injunction, which is of course, if the case be a proper subject of interpleader, would deprive a defendant, having such a case beyond the question of property, of part of his legal remedy, with the possibility, at least, of failing in the contest with his co-defendant, in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation. A party may be induced by the misrepresentation of the apparent owner of property to enter into a personal obligation with respect to it, from which he may be entitled to be released by a Court of Equity; but such a case could not be a subject for interpleader between the real and pretended owners, because the plaintiff would be asserting an equity for relief from a personal contract against one of the defendants, with which the other would have nothing to do.

Clarke *v.* Byne, 13 Vesey, 383; and see East India Co. *v.* Edwards, 18 Vesey, 376; Lowndes *v.* Cornford, 18 Vesey, 299; 1 Rose. 180; Harlow *v.* Crowley, Buck's Rep. 273.

(*o*) Swanston *v.* Simpson, 1 Jones & Carey, 188; Doran *v.* Everitt, 2 Irish Eq. Rep. 28; Rickard *v.* Hyde, 2 Irish Eq. Rep. 299.

(*p*) Stephens *v.* Callanan, 12 Price, 158; Hodges *v.* Smith, 1 Cox, 357, cited 16 Ves. 203.

(*q*) Bowyer *v.* Pritchard, 11 Price, 103; Blennerhasset *v.* Scanlan, 2 Moll. 539.

(*r*) Crawshay *v.* Thornton, 2 My. & Cr. 1-19; Glyn *v.* Duesbury, 11 Simons, 139; Stuart *v.* Welch, 4 My. & Cr. 305.

in suits of this nature, an affidavit(s) by the plaintiff must be made to the bill, or must be filed at the same time, stating that the bill is not exhibited in collusion with either of the defendants, but is on the plaintiff's own accord, to avoid being sued or molested touching the matters therein contained, and before any step(t) is taken in the proceedings, the money or rent forming the subject of dispute must be deposited into Court, but unless the plaintiff move for an injunction, an order on the defendant's part to compel(u) the plaintiff to deposit the money in bank will not be entertained.

In cases of interpleader, it is the plaintiff's duty(v) to bring the cause on for trial, and he must establish his title to maintain the suit, and it is proper to propose it is competent for him to read(w) passages out of any documents against the other defendants, and it is not necessary(x) for the defendants to enter into evidence as against each other, for if the cause is ripe(y) for decision, the Court decides it, and if not ripe, the Court directs an action or an issue, or a reference to the arbitrator(z) on the answers merely, as may best suit the circumstances of the case, but upon the hearing, evidence is admissible to shew that the plaintiff is not a party, but that the cause is really one of indemnity, instead of resting on the indemnity of the Court, has(a) the plaintiff given security by way of indemnity, and lent his name to one of the defendants, which forms a material feature in the cause. A person who brings a bill by an interpleader suit, ought not to delay filing his bill after verdict obtained by one of the defendants against him. The Court of Equity is unwilling to assist a party who has waived his right of every defence which could be afforded at law.

A decree must be obtained in an interpleading suit in order to suspend the proceedings between the defendants, as a dismissal of the bill is an end(c) to the cause and the jurisdiction of the Court, except as is necessary to dissolve an injunction, or to pay out the costs of the bill. After decree, the plaintiff has no further interest or concern in the cause, and his death will not(d) abate the proceedings. Where the

Ld. Chan. Pr. 241.

v. Bell, 6 Simons, 175;

Bchrens, 2 My. & Cr. 581;

in Melle, 8 Sim. 327.

Jennin v. O'Keefe, 1 Hogan,

ordered of by Ld. Lyndhurst, 3

Index, 1167; Practice, 14.

v. Gilham, Coop. Eq. Rep.

er v. Pritchard, 11 Price,

es & Medway Canal Co. v.

. 280.

(y) *Angell v. Hadden*, 16 Vesey, 202.

(z) *Thames & Medway Canal Co. v. Nash*, 5 Sim. 280.

(a) *Statham v. Hall*, Turn. & Russ. 30.

(b) *Cornish v. Tanner*, 1 Yo. & Jerv. 233; but see *Stephens v. Callanan*, 12 Price, 158; *Barclay v. Curtis*, 9 Price, 661.

(c) *Jennings v. Nugent*, 1 Molloy, 134; *Townley v. Deare*, 3 Beav. 213.

(d) *Anon.* 1 Vern. 351; 1 Eq. Ca. Abr. 2, plac. 6.

Court orders a trial at law, it is unnecessary to reserve further questions, as the verdict(*e*) is final, and terminates all questions of law in the cause, and if any party seeks to quarrel with it, his only remedy for doing so is by appealing against the decree, on the ground that the subject of controversy is fit exclusively for a Court of Equity. It is unnecessary for the plaintiff, in a bill of interpleader, to obtain a common injunction for want of an answer, which merely stays the proceedings: the regular course of proceeding(*f*) is by special application to obtain an injunction to stay proceedings at law until further order.

Where a tenant holding at the yearly rent of £10, brought an interpleading bill, and the subject of the suit did not exceed the yearly rent(*g*), the bill was dismissed as beneath the dignity of the Court. In an interpleading suit by a debtor(*h*) for the sum of £38, a bankrupt and his assignees, a strong disinclination was expressed by the Court to make any order respecting so small a sum of money. It is observed by Wigram, V. C., that the amount of the stake does not affect the plaintiff's right to compel the litigant(*i*) parties to interplead, for if the claimants think the subject in controversy worth pursuing, they cannot complain that the holder of the stake prefers to be a party to one suit rather than in two, for settling their disputes.

If the suit be properly instituted, the plaintiff will be ordered to pay the costs(*j*) out of the fund in court, or if there be no fund in court, against the party(*k*) who occasioned the litigation: costs between defendants are completely in the discretion of the judge, but are usually allowed(*l*) to follow the verdict at law; and where the cause of action or institution of the suit can be traced to one of the defendants, that defendant will be ordered(*m*) to pay the costs of the plaintiff, and of the innocent defendants.

(*e*) *Luscombe v. Callaghan*, 1 Molloy, 442.
204.

(*f*) *Moore v. Usher*, 7 Simons, 383;
Vicary v. Widger, 1 Simons, 15.

(*g*) *Smith v. Target*, 2 Anstr. 529;
but see *Crawford v. Fisher*, 1 Hare, 441.

(*h*) *Lowndes v. Cornford*, 1 Rose's
Bankrupt Cases, 180.

(*i*) *Crawford v. Fisher*, 1 Hare's Rep.

(*j*) *Campbell v. Solomons*,
St. 462; *Cowtan v. Williams*,
108; *Beames on Costs*, 37.

(*k*) *Aldridge v. Mesner*, 6

(*l*) *Luscombe v. Callaghan*,
204; *Hendry v. Key*, 1 Dick.

(*m*) *Mason v. Hamilton*, 5 Si

BOOK THE SIXTH.

RECOVERY OF POSSESSION.

CHAPTER I.

1. *Modes by which a Tenancy may determine.*
 2. *Where the Life on which a Lease depends has not been heard of for seven Years.*
 3. *The absence of Cestuique Vie does not raise any Presumption of his Death at any precise Time.*
 4. *Landlord may break open Doors, and remove Property on unoccupied Premises, after Lease expires.*
 5. *But cannot use Force to dispossess the Occupier, or his Family.*
 6. *Unless Leave and License for that Purpose be given.*
 7. *When a Third Person may enter upon another's Land to remove Property.*
 10. *Statute 8 Hen. VI. c. 9, enabling Justices to restore Party expelled.*
 11. *Statute 10 Car. I. Sess. 3, c. 13, Irish.*
 12. *Procedure by Indictment to obtain Restitution.*
 13. *Procedure before Justices for Restitution.*
 14. *Forcible Detainer.*
 15. *Award of Re-restitution.*
 16. *Tenant for Years can only be restored by Justices after Indictment.*
 17. *Procedure by Indictment before Justices.*
 18. *Statutable Remedy by Action of Trespass.*
 19. *Lawful Right to the Possession cannot be asserted by Violence.*
 20. *Irish Statute, 25 Geo. II. c. 12, Resistance to legal Process.*
 21. *Irish Statute, 26 Geo. III. c. 24, s. 64.*
 22. *Dublin Police Act, 5 & 6 Vict. c. 24, ss. 66 and 67.*
- FORCIBLE POSSESSION.
8. *What Acts constitute forcible Entry.*
 9. *Statute 5 Rich. II. st. 1, c. 8, and 15 Rich. II. c. 2.*

1. THE relation of landlord and tenant is determined, without any act by either of the parties, upon the regular expiration of the demise, or by the happening of any event upon which the lease was made to depend: a yearly tenancy may be put an end to by notice to quit, and where lands are holden under an executory agreement or accepted proposal for a lease, such holding being deemed merely a tenancy from year to year, may be determined by similar means, and on the expiration of the term(a) limited by the contract, determines without notice to quit or demand of possession. The tenant's interest under a lease, or under an equitable agreement for a lease, may also be forfeited by

(a) Doe dem. Tilt v. Stratton, 4 Bing. 446; 1 Moo. & P. 183; 3 Carr. & P. 164, S. C.; Doe dem. Bromfield v. Smith, 6 East, 530; 2 Smith, 570, S. C.; Doe dem. Thomson v. Amey, 12 Ad. & Ell. 476; 4 P. & Dav. 177.

reason of nonpayment of the reserved rent, or by breach of any of the covenants, for the non-performance of which it is stipulated that the lease or agreement shall be avoided. Where a person is tenant at will or is recognized(*b*) by the landlord as being in the legal occupation of the premises, he cannot be treated as a trespasser, or turned out of possession without a previous demand, but where a person is let into possession, either under a lease, or an executory contract for a lease, made in violation of the Statute law(*c*), he may be evicted by the owner without previous notice. If a lease contain a clause giving the landlord the right to reassume, or giving the tenant power to surrender the demised premises, the tenant's interest ceases by means of a compliance with the required formalities.

Derivative interests cease by the determination or avoidance of the original estate on which they depend: if a tenant for his own life or for a term of years, or for ninety-nine years, the lease expires on the lessor's death, or if the original estate be defeated by breach of a condition, the undertenant's interest will be defeated, but if such tenant for life surrender his estate(*d*), the undertenant's interest will continue, because the surrender, so far as regards the lessee, is in effect an assignment.

2. Where a lease is granted for lives, it frequently becomes difficult to ascertain whether the interest be subsisting or has determined, if any of the *cestuique vies* have quitted the country, as the law presumes the continuance of life in a person once known to be living, until the contrary be established.

In order to remedy this inconvenience, the Irish Statute(*e*), 7 Will. III. c. 8, after reciting, that leases were often granted for one or more life or lives, or for years, determinable upon one or more life or lives, enacts, that if such person or persons for whose life or lives such estates have been or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, their heirs or assigns, the judges before whom such action shall be brought shall direct the jury to give their verdict, as if the person so remaining be-

(*b*) Doe *dem.* Whitaker *v.* Hales, 7 Bing. 322; 5 Moo. & P. 132; Lessee Fleming *v.* Neville, Hayes, 23.

(*c*) Lapierre *v.* M'Intosh, 9 Ad. & Ell. 857; 1 P. & Dav. 629; there is no Irish Statute similar to the Act on which

this case turned.

(*d*) 2 Prest. Abstr. 199; Co. Litt. 338, A.

(*e*) 7 Will. III. c. 8, Irish; 19 Car. II. c. 6, English.

yond the seas, or otherwise absenting himself, were dead : and that(*f*) in any such action wherein the life or death of any such person or persons shall come in question between the lessor or reversioner, and the tenant in possession, it shall be lawful for the lessor or reversioner, to take exception to any of the jurors returned for the trial of that cause, that the greatest part of the real estate of any such juror is held by lease for life or lives, who upon proof thereof shall be set aside, as in case of other legal challenges : and if any person shall be evicted out of any lands or tenements by virtue of this Act(*g*), and afterwards if the person, upon whose life such estate depends, shall return again from beyond the seas, or shall, on proof in any action to be brought for the recovery of the same, be made appear to be living, or to have been living at the time of the eviction, that then, and from thenceforth, the tenant or lessee who was ousted of the same, his executors, administrators, or assigns, shall or may re-enter, re-possess, have, hold, and enjoy the lands or tenements as in his or their former estate, for and during the life, or so long term as the person upon whose life the estate depends shall be living, and shall also, upon action or actions to be brought by him or them against the lessors, reversioners, or tenants in possession, or other persons respectively, which, since the time of the eviction, received the profits of the lands or tenements, recover for damages the full profits of the lands or tenements respectively, *with lawful interest* for and from the time that he or they were ousted of the lands or tenements, and kept and held out of the same by the lessors, reversioners, tenants, or other persons, who after the eviction received the profits of the lands or tenements, or any of them respectively, as well in the case where the person upon whose life such estate did depend, shall be dead at the time of bringing the said action or actions, as if such person were then living.

This Statute applies only to cases where the tenant has been evicted by ejectment, and not where the tenant has(*h*) surrendered, or given up possession to his landlord on the supposition that the *cestuique vie* is actually dead. The remedy given by the Act in case the *cestuique vie* shall appear to be living, after eviction of the tenant by adverse suit, is very oppressive to landlords, as the tenant is awarded mesne profits and interest during the whole period, and therefore the construction of the Act ought not to be extended so as to deprive the landlord of the protection ordinarily afforded by the Statutes of Limita-

(*f*) Section 2.
(*g*) Section 3.

(*h*) *Caruth v. Ld. Northland, Hayes*,
233.

tion(i). The presumption of the duration of life with respect to persons of whom no account(j) can be given, ends on the expiration of seven years from the time when they were last known to be living, and the measure of time thus taken by the legislature as presumptive evidence of the deaths of persons absent and unheard of, has been adopted and applied to many cases which do not come within the Statute: the absence of a tenant for life without being heard of, for the space of seven years, will afford(k) sufficient ground for presuming his death, to warrant the entry of the person next in remainder. Where leases are granted for the lives of obscure persons, it is always prudent to insert a clause imposing on the lessee, and the persons deriving under him, the necessity of producing(l) proof of the existence of the *cestuique vie* when required to do so, in order to obviate the necessity of having recourse to the Statute.

3. The absence of a party from the realm for seven years without being heard of, though it naturally leads the mind to believe that that person is dead, and induces a presumption of the fact of his decease at the end of that period, yet such absence does not warrant any inference as to the exact time of his death. The law presumes that such person is dead, but not that he died at the beginning or at the end of any particular period during those seven years, and if it be important to establish the precise time of his death, it must be done by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of: the lessor of the plaintiff having claimed certain premises by title accruing on the death of Matthew Knight, who went to America early in the year 1807, and was not heard of after May, 1807: upon an ejectment brought in the year 1832, it was admitted that Matthew Knight must be presumed(m) to have died, and if the presumption of his death only arose at the end of seven years after his quitting the country, the suit was commenced in due time; but it was decided, that as no other evidence was given of his death than his absence, there was no ground

(i) 10 Car. I. Sess. 2, c. 6, Irish; 21 Jac. I. c. 16, English; 3 & 4 Will. IV. c. 27, s. 42, English and Irish.

(j) Matthews on Presumption, 279; Doe dem. George v. Jesson, 6 East, 85, by Ld. Ellenborough; Holman v. Exton, Carth. 246; Holt, 195, S. C.; Brown v. Petre, 2 Swanst. 235.

(k) Doe dem. Lloyd v. Deakin, 4 B. & Ald. 433; and see Hopewell v. De

Pinna, 2 Campb. N. P. C. 113.

(l) See a provision for the purpose in Randle v. Lory, 6 Ad. & Ellis, 218.

(m) Doe dem. Knight v. Nepean, 5 B. & Adol. 86; 2 Nev. & Mann. 219; Nepean v. Doe dem. Knight, 2 Mees. & W. 894; The King v. Inhabitants of Harborne, 2 Ad. & Ell. 541; 4 Nev. & Mann. 341, S. C.

for presuming that he died within twenty years before bringing the ejectment, because the presumption is merely that the individual died *at some time* within the first seven years, during which he has not been heard of, and the time of such person's death, whenever it is material, must be the subject of distinct proof: but where probable evidence is brought forward to shew that a party died at a particular time within the period of seven years(*n*), it may be presumed that the party died at that time.

4. Upon the determination of a tenant's interest, either by the expiration of a lease or by notice to quit, the landlord may, without legal process, peaceably resume possession of the premises, and drive away the cattle, and remove the goods of the former occupier, if an opportunity should be found of doing so without using any violence, as an action of trespass *quare clausum fregit* does not lie at the suit of a party whose title has determined.

A yearly holding being put an end to by notice to quit, the landlord availing(*o*) himself of an opportunity when there was nobody in the house, broke open the door and took possession; and although some furniture belonging to the tenant remained on the premises, it was decided that the landlord could not be treated as a trespasser. So a party having a right to land, acquires, by the entry(*p*) of himself or of his agent(*q*), such a lawful possession as enables him to maintain trespass against any person who, after such entry, wrongfully continues on the premises. Where a yearly tenant of a house leaves it merely for a temporary purpose, the landlord cannot lawfully enter into possession, but if the tenant wholly abandon the house without any *intention*(*r*) of returning, the landlord is not obliged to see his house fall to pieces for want of due care, but may, if it can be done peaceably, resume the possession without previous notice to quit. After judgement in ejectment, error was brought and bail given, and pending the proceedings in error the plaintiff brought an action of debt for rent, and it was ruled(*s*) that the writ of error did not hinder him from bringing debt, or

(*n*) *Sillick v. Booth*, 1 Yo. & Coll. 117, in Chan.; *Webster v. Birchmore*, 13 Vesey, 362.

(*o*) *Turner v. Meymott*, 1 Bing. 158; 7 Moore, 574; *Richardson v. Langridge*, 4 Taunt. 128; *Wildbor v. Rainforth*, 8 B. & Cress. 4; 2 Mann. & Ry. 185; *Taunton v. Costar*, 7 T. R. 431; *Argent v. Durrant*, 8 T. R. 403; *Taylor v. Eastwood*, 1 East, 212; *Davis v. Connop*, 1 Price, 53; *Longstaff v. Mea-*

goe, 2 Ad. & Ell. 167; 4 Nev. & M. 211; and see *Baker v. Morgans*, 2 Dow's Parl. Ca. 531, by Ld. Redesdale.

(*p*) *Butcher v. Butcher*, 7 B. & Cr. 402; 1 M. & Ry. 220.

(*q*) *Hey v. Moorhouse*, 6 Bing. New C. 52; 8 Scott, 156.

(*r*) *Lacey v. Lear*, Peake's Additional Cases, 210.

(*s*) *Badger v. Floyd*, Cases temp. Holt, 199; 12 Mod. 398; 3 Salk. 145;

from distraining, as he might *have entered without a writ of execution* after judgement in a real action, the plaintiff might have entered, notwithstanding a writ of error, if his entry were lawful without the judgement, because the judgement should not put him in a worse condition than he was before.

5. An opinion has prevailed for a long time, and is still supported by high authority, that in all cases(*t*) where ejectment can be maintained, the lawful owner has a right to enter(*u*) *by force*, and to remove not only the property, but the persons of wrong-doers, or those overholding possession, without incurring any civil responsibility, provided no unnecessary violence be used or assault committed. It is laid down that if a person enter into lands or tenements(*v*) with force or multitude of people, where his entry is lawful, his entry is not punishable *by action* at common law, or upon any Statute, because where the occupier's title is not good, then he has no cause of action, although the claimant enter by force.

The question, however, has been lately much discussed, whether after a tenancy has been determined by notice to quit, the landlord may enter on the premises, while the tenant(*w*) remains *personally* in possession, and after requesting him to depart, on his refusing to do so, may turn him out of possession, using as much force and more than is necessary for that purpose: the majority of the judges of the Common Pleas of England held it was necessary, for the purpose of deciding this question, to ascertain whether the landlord entered upon the premises, in a forcible manner contrary to the provisions of the Statutes against forcible entry, or so as to render himself liable to an indictment at common law, for if the landlord were guilty either of a breach of a positive Statute, or of an offence against the common law, such violation of the law in making the entry would cause the possession, thereby obtained, to be illegal. Where a tenant overholds possession of hired apartments after the expiration of his term, a landlord is not justified in using such(*x*) force and violence for their recovery as amounts to a forcible entry, and by doing so he will be answerable

Withers *v.* Harris, 2 Ld. Raym, 806; 7 Mod. 69; Taylor *dem.* Atkyns *v.* Horde, 1 Burr. 88, *argo*.

(*t*) Rogers *v.* Pitcher, 6 Taunt. 207; 1 Marsh. 541.

(*u*) Year Book, 9 Hen. VI. fo. 19, pl. 12; Year Book, 15 Hen. VII. fo. 17, pl. 12; Taylor *v.* Cole, 3 T. R. 295; and see an able article on this subject, 1 Law Mag. 82.

(*v*) Dalton's Justice of Peace, c. 12; Hawk. Pleas of the Crown, lib. 1, c. 2, s. 3; 4 Blackst. Comm. 148; and see Baker *v.* Morgans, 2 Dow's Parl. Cas. 531, by Ld. Redesdale.

(*w*) Newton *v.* Harland, 1 Mann. Gr. 644-658; 1 Scott's New Rep. 47.

(*x*) Newton *v.* Harland, 1 Mann. Gr. 644; 1 Scott's New Rep. 474, S -

in damages for the trespass and assault, because a lawful possession cannot be derived out of, or produced by, an act which is in itself criminal, but in order to constitute a forcible entry within the meaning of these Statutes, either the outer door must be broken open, or the entry must be accompanied with violence and outrage. Where an undertenant refused to give up possession of part of a dwelling-house which he occupied, on the expiration of a notice to quit served on the immediate tenant, and the family of the undertenant were forcibly removed, Lord Lyndhurst ruled(*y*), in an action of trespass by the undertenant, that the landlord might enter on the expiration of the term, where no person was in possession, but that he was not justified in expelling the undertenant's family by force: and Lord Abinger held(*z*) that a tenant by sufferance, who was forcibly dispossessed of a cottage and premises by his landlord without any previous demand, could not maintain ejectment, as he had no interest in the land, though he might bring trespass.

After judgement in ejectment, the recoveror, it is said, may enter at his peril and execute(*a*) his judgement, and that the assistance of the sheriff is only required to preserve the peace: however, where a mortgagee obtained judgement in ejectment, and after more than a year had elapsed, issued and executed his writ of *habere* without reviving the judgement, the Court set aside the execution for irregularity, but the judgement being regular was not disturbed: and it was ruled(*b*) that although the mortgagee had lawful right to the possession, he could not be allowed, by his own act, without authority from the Court, to retain the possession after the writ of *habere*, under which he entered, had been set aside.

6. A landlord having distrained for rent, the tenant signed an undertaking, that if the landlord gave up the distress, possession of the premises should be given to him on or before the end of a week: the tenant having acted(*c*) upon this agreement, by selling for her own benefit part of the goods which were distrained, the landlord, at the end of the week, took possession, by nailing up the doors and windows, and it was ruled that the instrument operated as a license, which could not be revoked after it had been acted on, and that trespass was not

(*y*) *Hillary v. Gay*, 6 Carr. & P. 284.

(*z*) *Doe dem. Harrison v. Murrell*, 8 Carr. & P. 134.

(*a*) *Harris v. Austen*, 1 Ro. Rep. 210—213, by *Ld. Coke*; *Lady Warwick v. Lord Barkley*, Noy. 71; *Anon.* 2 Siderf.

156; *Withers v. Harris*, 2 Ld. Raym. 807.

(*b*) *Doe dem. Stephens v. Lord*, 7 Ad. & Ell. 610; 2 Nev. & P. 604; 6 Dowl. Pra. Ca. 155.

(*c*) *Feltham v. Cartwright*, 5 Bing. N. C. 569; 7 Scott, 695.

maintainable against the landlord. Where a tenant entered under an agreement, which stipulated that if the reserved rent should be in arrear for ten days, it should be lawful for the lessor and her agents to enter upon the premises and expel the tenant, and all persons deriving under her, as effectually as a sheriff(*d*) might do under a writ of possession; and in case of such entry, and of any action for the expulsion, the defendants thereto might plead leave and license in bar thereof, and that the agreement might be used as conclusive evidence of the tenant's leave and license for such entry, trespasses, and other matters to be complained of in such action; an arrear of rent having become due, the defendants, as agents of the lessor, expelled the tenant, and in an action of trespass for the expulsion, alleging an assault and battery, the agreement was held a conclusive answer under a plea of leave and license to all the trespasses complained of.

7. A person having bought in the month of January a large quantity of hay on a tenant's farm, which was sold under a distress(*e*) for rent, subject to a stipulation that it might remain on the land until the Lady-day following, and in the mean time that the purchaser might enter and remove it as often as he pleased: the tenant having forbidden the entry of the purchaser on the premises, he caused the gate to be broken open and carried away the hay: in an action for breaking and entering the close, the purchaser pleaded leave and license; and on a motion to set aside a verdict obtained by him, it was ruled that the tenant, by agreeing to the conditions of sale, and having induced another to become purchaser of the hay, could not afterwards withdraw the license.

Where a party *wrongfully* takes the goods of another, and puts them upon his own(*f*) close, he gives the owner of the goods an implied license to enter for the purpose of recaption, but if the goods were delivered by the owner(*g*) for the purpose of safe keeping, he cannot justify an entry into the house of the bailee for the purpose of retaking the property, which was placed there by mutual agreement and not by wrong: so the mere fact of the goods of an individual being found on the land of another, affords(*h*) no justification to the owner of the

(*d*) *Kavanagh v. Gudge*, 8 Jurist. 362; and see the terms of the demise in *Cattle v. Gamble*, 5 Bing. N. C. 46; 6 Scott, 733; *Doe dem. Beaumont v. Beaumont*, 2 Dowl. Pr. Ca. 172, N. S.

(*e*) *Wood v. Manley*, 11 Ad. & Ell. 34; 3 P. & Dav. 5; *Salter v. Woollams*, 3 Scott's New. Rep. 59; 2 Mann. & Gr. 650. S. C.

(*f*) Bro. Abr. Trespas, pl. 186; Year Book, 9 Edw. IV. fo. 35, pl. 10, A., by Littleton; *Patrick v. Colerick*, 3 Mees. & W. 483.

(*g*) Year Book, 21 Hen. VII. fo. 13 pl. 18; Bro. Abr. Trespas, pl. 208.

(*h*) *Anthony v. Haneys*, 8 Bing. 186 1 Moo. & Sc. 300, S. C.

goods for his entry to remove them, unless it be shewn that they were wrongfully placed there by the owner of the land.

8. In the next place, it is to be considered what acts constitute the offences of forcible entry and of forcible detainer, the mode of proceeding to punish the offenders, and to procure restitution of the property. A forcible entry is committed by violently taking possession(*i*) of lands, or tenements, with menaces, force and arms, and without the authority of law : or where the entry is peaceable, by compelling the occupier, by force, or by threats, to quit the possession ; but an entry, or detainer, merely amounting to a trespass(*j*), will not support an indictment. An entry may be deemed forcible, where the wife, children, or servants of the occupier are(*k*) on the land for the purpose of keeping possession, but the occupation of the ground by his cattle is not sufficient to preserve the possession : if a person be prevented by force from returning to his house, and possession be obtained peaceably during his absence, the entry is considered forcible, because the use of force, whether it be upon or off the land, is equally within the Statutes. Breaking open the outer door of a house, if any person be within, is forcible, but if the door be opened(*l*) with a key, or by raising the latch, or if admittance be gained through an open window, when there is nobody in the house, or if the occupier be induced to leave the house, and is then quietly excluded, such an entry will not constitute an indictable offence. If a person enter into a dwelling-house, though it be unoccupied(*m*), with an armed party, or a numerous body of assistants, or if persons(*n*) take, or keep possession, with such a show of force as is calculated to deter the rightful owner from resuming his possession, the offence will be complete ; and if several persons assist another by a display of force, though they take no part in the actual entry, such abettors will be deemed guilty of the offence.

If a person having an estate in land by a defeasible title, continue to hold the possession by force, after a claim made by one having right to enter, he will be punishable for a forcible entry(*o*), because all his estate was defeated by the claim, and his subsequent occupation, in judgement of law, amounts to a new entry : so if a tenant from year to year, after the determination of his tenancy, retain possession by

(*i*) 4 Bla. Comm. 148.

(*j*) Rex v. Bake, 3 Burr. 1731 ; The King v. Wilson, 8 T. R. 360.

(*k*) Bac. Abr. Forcible Entry, B. ; Dalton's Just. 299.

(*l*) Anon. 2 Ro. Rep. 2 ; Newton v. Harland, 1 Mann. & Gr. 669, by Colt-

man, J.

(*m*) Pollard v. Moreton, Moor. 656.

(*n*) Milner v. Maclean, 2 Carr. & P. 17 ; Rex v. Smyth, 1 Moo. & Rob. 155 ; 5 Carr. & P. 201.

(*o*) Bac. Abr. Forcible Entry, B. ; Hawkins's P. C. c. 64, sec. 34.

force, his holding over may be considered(*p*) constructively as an lawful entry, but the mere refusal of a lessee, after the determination of his interest, to leave the house or to open his door, will not have effect. A bailiff or servant having the care or custody of a dwelling-house, and refusing(*q*) to restore the possession to his employer, may be turned out by force, and the outer door may be broken open for that purpose.

The same circumstances of violence or terror which will render entry forcible, will also make a detainer forcible: a lessee, who at the expiration of his lease keeps arms in his house to oppose(*r*) the landlord's entry, or a tenant at will, who detains possession with force, at the expiration of his interest, is guilty of forcible detainer, though no forcible entry into the premises be attempted. A person may arm himself and his friends to defend the possession of his dwelling-house against such threatened(*s*) an unlawful entry, but he cannot justify doing so for maintaining possession of his land.

Several Statutes have been passed in England for the punishment of offences by forcible entry or detainer, which are in force, or have been re-enacted in Ireland, and under these Statutes restitution may be awarded to the persons forcibly dispossessed.

9. By the Statute(*t*), 5 Ric. II. c. 8, it is enacted, that none shall make entry into lands and tenements, but in case where entry is given by law, and then not with strong hand nor with multitude of people but only in a peaceable manner: and by Statute, 15 Rich. II. c. 2(*u*) it is enacted, that at all times that such forcible entries shall be made and complaint thereof come to the justices of the peace, or any one of them, the same justices or justice shall take sufficient power of the county, and go to the place where the force is made, and if they find any that hold such place forcibly after such entry made, they shall be taken and put into the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the king: and that all the people of the county, as well the sheriff and others, shall be attendant upon the same justices to assist them to arrest such offenders.

(*p*) *The King v. Oakley*, 1 Nev. & M. 58-65, by James Parke, J.; 4 B. & Adol. 307.

(*q*) *Lady Russel v. Ld. Nottingham*, Moor. 786; Cro. Jac. 17; *The King v. Inhabitants of Cheshunt*, 1 B. & Ald. 473; *Wildbore v. Rainsforth*, 2 M. & Ry. 185; 8 B. & Cr. 4.

(*r*) *Baron Snigge v. Shirton*, Cro.

Jac. 199.

(*s*) *The King v. The Bishop of Bangor*, 1 East, P. C. 287; 1 Russ. Crim. Law, 273.

(*t*) 5 Ric. II. stat. 1, c. 8, English and Irish.

(*u*) 15 Rich. II. c. 2, English and Irish.

10. Neither of these Statutes having afforded redress where the entry had been *peaceable*, and the land was *detained* by force, it was enacted by the 8 Henry VI. c. 9(v), that where any doth make forcible entry into lands, tenements, or other possessions, or hold them forcibly, and after complaint thereof made within the same county where such entries were made to the justices of the peace, or one of them, by the party grieved, the justices or justice so warned, within a *convenable* time, shall cause the said Statute to be duly executed, at the costs of the party grieved; and that(w) such justices or justice, in some good town next to the tenements so entered, or in some other convenient place, shall have power to inquire by the people of the same county, well of them that make forcible entry into lands, tenements, or other possessions, as of them which hold the same by force, and if it be found, before any of them, that any doth contrary to the Statute, then the justices or justice shall cause the lands and tenements so entered or holden to be resealed, and shall put the party so put out, in full possession of the said lands and tenements so entered or holden as before; and if any person(x) be put out or disseised of lands or tenements in a forcible manner, or be put out peaceably, and after be holden out with wrong hand, that the party grieved in this behalf shall have a writ of *spass* against such disseisor, and if it be found by verdict, or in other manner by due form in the law, that the defendant entered with force on the lands or tenements, or them after his entry did hold with force, that the plaintiff shall recover treble damages against the defendant, and that he make fine and ransom to the king: provided always(y), that they which keep their possessions with force in any lands and tenements whereof they or their ancestors, or they whose estate they are in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute.

11. By the Irish Statute, 10 Car. I. Sess. 3, c. 13(z), it is enacted, that no restitution upon any indictment of forcible entry or holding with force, be made unto any person or persons, if the person or persons indicted hath or have had the occupation, or hath or have been in the quiet possession by the space of three whole years together, next before the day of such indictment so found, and his, her, or their estate therein not ended or determined, which the party indicted shall and

(v) 8 Hen. VI. c. 9, s. 2, English and Irish.

(w) Sect. 3.

(x) Section 6.

(y) Section 7.

(z) 10 Car. I. Sess. 3, c. 13, s. 1, Ir.; 31 Eliz. c. 11, s. 3, English.

may allege for stay of restitution ; and restitution to stay until that tried, if the other will deny or traverse the same : and if the same allegations be tried against the same person or persons so indicted then the same person or persons so indicted, to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried, the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgements upon other actions ; and that such judges or justices of the peace(*a*) as by reason of any Act of Parliament then in force were authorized, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withheld by force, shall, by reason of this Act, have the like and the same authority and ability (upon indictment of such forcible entries, or forcible withholding, before them duly found) to give like restitution of possession unto tenants *for term of years*, and tenants by *elegit* of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force : and that all(*b*) and every justice and justices of assize shall, in their several circuits, have the like power and authority, to all intents and purposes, to inquire, hear, and determine of all forcible entries and forcible holding, and all other offences, as well against the Statute of the eighth year of King Henry the Sixth, as against this present Statute, and to award restitution of possession in all cases, as any other judge or justice of the peace could or may do by this Act, or by any other Statute of force within this realm.

12. A mere trespass, being the subject of a civil action, cannot be converted into an indictable offence(*c*), and, therefore, an indictment for pulling off the thatch(*d*) of a dwelling-house, of which the owner was in peaceable possession, was quashed, being only a private injury, as there was no allegation of its being done with strong hand, or with a multitude of persons.

In order to obtain restitution of premises forcibly taken or detained, the party grieved may proceed by indictment at the quarter-sessions or assizes, or by complaint before any justice of the peace for the county where the offence was committed. Upon an indictment under these Statutes, the offence should be laid to be done with strong hand(*e*), or

(*a*) 10 Car. I. Sess. 3, c. 13, s. 2 Ir. ; 21 Jac. I. c. 15, English.

(*b*) 10 Car. I. Sess. 3, c. 13, s. 3, Ir. ; there is no similar clause in any English Act.

(*c*) Rex v. Storr, 3 Burr. 1698 ; Rex

v. Bake, 3 Burr. 1731 ; The King v. Wilson, 8 T. R. 357 ; The King v. Smyth, 5 Carr. & P. 201 ; 1 Moo. Rob. 155.

(*d*) Rex v. Atkins, 3 Burr. 1706.

(*e*) Bac. Abr. Forcible Entry, 8.

with a number of persons, and the indictment must shew that the party injured had such an estate in the tenements at the time(*f*) of the force as will bring the case within the Statutes, either by averring he was dispossessed(*g*) of a freehold estate, or was possessed(*h*) of a term for years, or under a writ of *elegit*.

Upon a bill of indictment found for forcible entry, or forcible detainer, the Court may award restitution before(*i*) trial of the offence, but as such bills of indictment are commonly found wholly, or in part, upon the testimony of the individual entitled to restitution, the Court will not order that he should be reinstated in the possession, unless a sufficient case be made by affidavit to warrant their interference. An indictment for forcible entry lies at(*j*) common law, provided the party be charged with having used such force, as constitutes a public breach of the peace, and a count framed at common law may be joined with counts(*k*) for forcible entry under the Statutes. The party dispossessed is not a competent(*l*) witness for the prosecution on the trial of an indictment for forcible entry or detainer under(*m*) the 8 Hen. VI., or the 10 Car. I., nor is it competent for the defendant to impeach the title(*n*) of the party dispossessed, as the question of title cannot be inquired into on such proceedings, but the prosecutor, or the person dispossessed, will be a competent witness upon the trial of an indictment at common law, as he can derive no direct advantage from a conviction.

After conviction of the offenders at the assizes or quarter sessions, the sheriff will be ordered by the Court to restore the person who was forcibly dispossessed(*o*), if the circumstances of the case shall require such a remedy: and where the proceedings have been removed by *certiorari* into the King's Bench, the Court exercise their discretion in affording similar relief. Restitution, however, will only be awarded to the individual found by the indictment to have been de-

(*f*) Moore and Lankfoorde's case, 1 Bulstr. 177.

(*g*) The Queen v. Griffith, 3 Salk. 69; Rex v. Dorny, 1 Ld. Raym. 610; Salk. 260; The Queen v. Bowser, 1 Villm. Woll. & H. 345; 8 Dowl. Pr. 128; Rex v. Wannop, Sayer, 142.

(*h*) Bac. Abr. Forcible Entry, E.; Com. Dig. Forcible Entry, D. 4; The King v. Arden, 3 Bulst. 71.

(*i*) The King v. Hake, 4 Mann. & Ry. 483, where the form of the warrant is given; The King v. Marrow, Cases temp. Hardwicke, 174; Fawcett's case, Cro. Jac. 148; Yelv. 99; Bac. Abr.

Forcible Entry, F.

(*j*) The King v. Wilson, 8 T. R. 357.

(*k*) Rex v. Bathurst, Sayer, 225.

(*l*) The King v. Williams, 4 Mann. & Ry. 471; 9 B. & Cress. 549, S. C.; Rex v. Beavan, Ry. & M. 242.

(*m*) 8 Hen. VI. c. 9, Eng. & Irish; 10 Car. I. Sess. 3, c. 13, Irish; 21 Jac. I. c. 15, English.

(*n*) The King v. Williams, 9 B. & Cress. 549; 4 Mann. & Ry. 471, S. C. 4 Bla. Comm. 148.

(*o*) The King v. Hoare, 6 M. & Selw. 266; 2 Chitty's Rep. 314, S. C.

prived of the *actual* possession, and consequently cannot be granted to an heir(*p*) upon an indictment finding a forcible entry made upon his ancestor, nor to an heir, where a stranger entered on the ancestor's death.

13. Upon complaint of the party injured, or upon the information of any other person, a justice of the peace, after summons requiring the person to appear and answer, may(*q*) view the tenements forcibly taken, or detained, and if admittance be refused, may cause the outer door to be broken open for the purpose of removing the force, and may arrest the offenders, and, after conviction, inflict a separate fine on each of them, and commit them to gaol until such fines shall respectively be paid. The offenders may appear on the summons, and tender a written(*r*) traverse of the force, or plead a possession for three years next preceding, which will stay any award of restitution until the matter be tried before a jury; but if the defendants do not traverse, the magistrate may decide summarily upon his view of the force, and upon satisfactory evidence(*s*) that the entry of the offenders was unlawful, and was made within less than three years, he may make a record(*t*) of the conviction, and after convicting the parties of the offence, should inflict a separate fine upon each of the offenders, and commit them to the county gaol until such fines shall be paid by them respectively: a duplicate of the conviction should be transmitted to the clerk of the peace, that the fines may be estreated into the Exchequer.

14. There is a material distinction between a forcible entry and a forcible detainer: the Statute, 15 Ric. II. c. 2, makes a forcible(*u*) entry, in all cases, cognizable by justices in a summary way, but a forcible detainer only when preceded by a forcible entry: the Statute of 8 Hen. VI., renders a forcible detainer an offence cognizable by justices even when preceded by a peaceable entry, but such preceding entry must be unlawful, or it must be shewn that the forcible detainer was unlawful, and it is not sufficient that the conviction should allege merely that the detainer was unlawful, but it must aver such facts as would shew the detainer to have been unlawful, because the Statute

(*p*) Bac. Abr. Forcible Entry, F.; Hawkins, P. C. c. 64, s. 46.

(*q*) See the form of conviction by justices on their view, given at length in *The King v. Wilson*, 1 Adol. & Ell. 627.

(*r*) Hawkins, P. C. c. 64, s. 60; *The King v. Oakley*, 1 Nev. & M. 65; *Regina v. Layton*, 1 Salk. 353; *Regina v. Winter*, 2 Salk. 587; Holt. 324, S. C.

(*s*) *The King v. Wilson*, 1 Ad. & Ell. 627; 3 Nev. & Mann. 753, S. C.; 3 Ad. & Ell. 817; 5 Nev. & Mann. 164, S. C.

(*t*) *The King v. Oakley*, 1 Nev. & Mann. 58; 4 B. & Adol. 307, S. C.

(*u*) *The King v. Oakley*, 4 B. & Adol. 307; 1 Nev. & Mann. 58, S. C.; *The King v. Wilson*, 3 Ad. & Ell. 817; 5 Nev. & Mann. 164, S. C.

ought not to be executed against a person holding property to which he is entitled against a wrong-doer. A conviction was, therefore, quashed(*v*), where it did not appear by the information as recited in the conviction, or by the conviction itself, either that the defendant had unlawfully entered, or that the defendant was not the rightful owner, and which did not aver that the defendant unlawfully held possession, or kept any person out of possession.

An indictment or conviction for forcible(*w*) detainer is sufficient, without shewing whether the entry of the defendant was forcible or peaceable, but an(*x*) unlawful entry must be averred in the information, and must be proved by the evidence, and must be adjudged by the justices, and it must also appear that the party was summoned and had opportunity of defending himself against the accusation.

The convicting magistrate should, by the finding(*y*) of a jury summoned as directed by the Statute, 8 Hen. VI. c. 9, s. 4, ascertain the lawful and peaceable seisin of the person unlawfully removed, and the lawful entry and expulsion, and an unlawful detainer with strong hand and an armed force, by the defendant. Upon this inquisition, restitution may be awarded by the justice to the party injured, which such justice may either execute in person, or make his precept to the sheriff to restore the possession.

15. If the conviction be defective, the inquisition founded on it will be set aside and re-restitution awarded, for if the inquisition were permitted to(*z*) stand, it would appear to justify the transfer of the possession worked by means of the conviction, which the Court will not permit after the conviction itself is given up as indefensible. Wherever, therefore, a conviction for forcible entry is quashed, a writ of restitution will be awarded, and the Court will not investigate, or inquire into the title of the party dispossessed.

16. A magistrate, however, has no authority to award restitution in a summary way to a person holding for years, unless after indictment found, because(*a*) the 8 Hen. VI. c. 9, only extends to freehold-ers, and the 10 Car. I. only gives(*b*) relief to termors for years upon indictment found.

(*v*) *The King v. Wilson*, 3 Ad. & Ell. 817; 5 Nev. & Mann. 164, S. C.

(*w*) *Sir William Fitzwilliam's case*, Cro. El. 915; Cro. Jac. 19; *Ld. Salisbury v. Ashley*, Palmer, 194.

(*x*) *The King v. Oakley*, 4 B. & Ad. 107; 1 Nev. & M. 58; *The King v. Wilson*, 3 Adol. & Ell. 817; 5 Nev. & Mann. 164, S. C.

(*y*) *The King v. Wilson*, 1 Ad. & Ell. 629.

(*z*) *The King v. Wilson*, 3 Ad. & Ell. 817; 6 Nev. & Mann. 852, S. C.; *Rex v. Jones*, 1 Stra. 474.

(*a*) 8 Hen. VI. c. 9, Eng. & Irish, 10 Car. 1, sess. 3, c. 13, Irish; 21 Jac. I. c. 15, English.

(*b*) *Cole v. Eagle*, 8 B. & Cress. 409; *Rex v. Dorny*, 1 Ld. Raym. 610.

17. If the magistrate refuse to proceed in a summary manner upon his own view, he may receive the complaint of the party grieved as an indictment, or he may take informations for the offence, and return them for trial at the quarter sessions or assizes. The procedure in a summary manner, or by indictment to be tried before a justice, is attended with so much difficulty(c) and inconvenience, that a magistrate, wishing to act prudently, should always refer the subject to be disposed of at the assizes, or quarter sessions.

18. The Statute, 8 Hen. VI. c. 9, gives a remedy by action of trespass, where a person is disseised of lands or tenements with strong hand, and entitles the party forcibly dispossessed to treble damages(d) and costs, but this action only lies at the suit of the(e) freeholder, because the Statute is confined(f) to cases of disseisin. In case an action is brought on the Statute, if the defendant establish his title which is found for him, he shall be dismissed without any inquiry(g) concerning the force, for howsoever he may be punishable at the king's suit for doing what is prohibited by Statute, as a disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff whose injustice gave him the provocation in that manner to right himself.

19. A person entitled to the immediate possession of lands was by the common law, justified in entering(h) forcibly upon the premises, and in removing the occupiers, provided no unnecessary violence were used, and the entry was made shortly after the disseisin; this doctrine has, however, been qualified, by holding that even a lawful right to the possession cannot be asserted with the aid of a number of persons, or by an armed party, as such a proceeding might tend to produce disturbances affecting the public peace. An indictment charging twelve persons with having unlawfully with strong hand entered the prosecutor's mill, and expelled him from his possession was held maintainable(i) upon demurrer; and Lord Kenyon observed he did not mean to express any opinion whether, at common law, a party might enter with force into land where he had the legal(j) title.

(c) *The King v. Wilson*, 3 Ad. & El. 829; 5 Nev. & Mann. 164, S. C.; *ex parte Davy*, 2 Dowl. Pr. Ca. 24, N. S.

(d) *Milner v. Maclean*, 2 Carr. & P. 17.

(e) *Cole v. Eagle*, 8 B. & Cress. 409.

(f) See the form of declaration, 2 Chitty's Plead. 865.

(g) See Butler's note 199 to Co. Litt.

257, A.; 1 Hawkins, P. C. 141.

(h) Butler's note 199 to Co. Litt. 257, A.

(i) *The King v. Wilson*, 8 T. 357; *The King v. Smyth*, 1 Moo. & R. 155; 5 Carr. & P. 201; *Rex v. Baker*, 3 Burr. 1731.

(j) See a dissertation on this subject in the first volume of the *Law Magazine*, 82.

the Court could not intend that the defendants had any title appeared they had entered unlawfully.

it of *mandamus* will not be issued to compel magistrates to and take(k) informations touching a forcible entry, and to therein according to law, where informations were taken, and strates, after an examination of witnesses, refused to interfere. The Irish Statute, 25 Geo. II. c. 12(1), after reciting that less of the law for giving and for restoring and quieting the on of lands and tenements was frequently resisted by numbers assembled in a riotous manner, insomuch that many people en maimed and dangerously wounded, and others have lost es in endeavouring to execute the process of the law, and that ns of lands and tenements have been held for a considerable r such resistance and opposition: *it is enacted*, that whenever iff, or other officer duly authorized to execute any process of for giving, quieting, or restoring the possession of lands or ts, shall be forcibly resisted, and prevented from executing e, every person having right thereby to be quieted in, or to their possessions, shall, from the time of such resistance osition, be deemed to be in the actual possession of such lands ments, to all intents and purposes, as fully and completely as eriff or other officer had duly executed the process; and shall ed to the rents, issues, and profits of such lands and tenements e time of giving and pronouncing the judgement, or decree, h such process was founded: and the payment of rent for such id tenements, becoming and arising due from and after the such judgement, or decree, to any other person, shall be, and oy declared to be unlawful and void, and all rents and profits thereout from the time of such judgement, or decree, are to be the property of the person entitled to the possession uch judgement, or decree: and that every person who shall lly keep possession of such lands and tenements after the she-ther officer, shall have been prevented from executing such shall respectively forfeit to the person who ought to have ueted, or restored by such process, double the value of the id profits of such lands from the time of pronouncing such nt, or decree, on which such process was founded, to be reco- / action in any of his Majesty's superior courts.

the Queen v. Gresson, 2 Ir. Law
Davy, *ex parte*, 2 Dowl. Pr.
1. S.

(1) 25 Geo. II. c. 12, s. 4, Irish, perpe-
tuated by the 40 Geo. III. c. 96, s. 3,
Irish.

21. By the Irish Statute(*m*), 26 Geo. III. c. 24, after reciting that great outrages were daily committed in many parts of Ireland by desperate persons, who assembled in great numbers, and strong armed, forcibly, and *without any title*, take and withhold the possession of houses and lands, and oppose the execution of process of the law for giving or quieting such possession, in defiance of the civil power, *it is enacted*, that if any person or persons shall forcibly, and without due process of law, take the possession of any house, land, or tenement, and forcibly, and without due authority by law, hold such possession so taken by force, or shall forcibly oppose or resist the execution of any process of the law for giving or quieting the possession of any house, land, or tenement, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and be transported for the term of seven years: and if any person(*n*) shall be presented or indicted by the grand jury at any assizes or general quarter-sessions in Ireland, for having committed any such offence, such presentment or indictment shall forthwith be returned to the clerk of the council by the clerk of the Crown, or clerk of the peace respectively acting at such assizes or sessions; and the person or persons named in such presentment or indictment shall, by proclamation of the lord lieutenant and council, be ordered to surrender; and in case such person or persons do not, within the time limited by such proclamation, surrender to some one or more of the justices of the peace of the county where such presentment or indictment shall be made, he or they so presented or indicted and proclaimed shall be deemed convict of felony, and transported as in cases of felony.

22. It may be expedient to take notice in this place, of a limited jurisdiction conferred on magistrates respecting the relation of landlord and tenant, within the police district of Dublin. By the Statute 5 & 6 Vict. c. 24, every person(*o*) who shall occupy any house or lodging within the police district of Dublin as tenant thereof, and who shall wilfully or maliciously do any damage to the premises, or to any furniture thereof, not being the property of such tenant or occupier, shall, upon complaint made to one of the divisional justices, within one calendar month next after the commission of the offence, or the end of the tenancy or occupation, forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage

(*m*) 26 Geo. III. c. 24, s. 64, Irish.

(*n*) Sect. 65.

(*o*) 5 & 6 Vict. c. 24, s. 66, Irish; and see the provisions of the Irish Statute,

9 Geo. IV. c. 56, ss. 24, 25, 26, 27, 28, for preventing malicious waste to houses or buildings, or by removing fixtures.

not more than the sum of fifteen pounds, to be paid to the land-
party aggrieved: and that(*p*) on complaint made to any of the
1 justices, by any person who shall, within the police district,
occupied any house or lodging by the week or month, or whereof
does not exceed the rate of fifteen pounds by the year, that his
have been taken from him by an unlawful distress, or that the
or his broker or agent, has been guilty of any irregularity or
in respect of such distress, it shall be lawful for such justice to
the party complained against; and if upon the hearing of the
shall appear to the justice that such distress was improperly
unfairly disposed of, or that the charges made by the party
distrainted, or having attempted to distrain, are contrary to law,
the proceeds of the sale of such distress have not been duly ac-
crued to the owner thereof, it shall be lawful for the justice to
the distress so taken, if not sold, to be returned to the tenant,
amount of the rent which shall appear to be due, at such time as
he shall appoint, or if the distress shall have been sold, then
payment to the tenant of the value thereof, deducting thereout
which shall so appear to be due, such value to be determined
by the justice; and such landlord or party complained against, in de-
fiance of any such order, shall forfeit to the party ag-
grieved the value of such distress, not being greater than fifteen pounds,
the value to be determined by the justice.

(*p*) 5 & 6 Vict. c. 24, s. 67, Irish.

CHAPTER II.

POSSESSORY BILL.

23. *Nature of possessory Bill.*

24. *Origin of this Mode of Proceeding.*

25. *Requisites to maintain possessory Suit.*

26. *Possessory Bill and Affidavit to verify.*

27. *Defence to the Suit.*

28. *Mode of joining Issue and proving the Facts.*

29. *No Revivor permitted in posses-*

sory Causes.

30. *Necessary Parties.*

31. *Possessory Bill should be adopted in clear Cases.*

32. *Triennial Possession.*

33. *Smith v. O'Shaghnessy.*

34. *Possessory Bill by Remainder.*

35. *Possessory Bill for Easement.*

36. *Possessory Bill to stay Waste.*

23. WHERE a person is dispossessed of lands or tenements by actual(a) or by constructive force, a summary remedy for recovery of the possession may be resorted to in Ireland, by exhibiting a bill in equity called a "possessory bill." This proceeding formerly constituted an extensive branch of equitable jurisprudence, and embraced a great variety of subjects, as if a person were disturbed in the enjoyment of an ancient passage or watercourse(c), or if ancient lights were darkened or obstructed, or if waste were committed by a tenant on demised premises, the Court interfered by injunction to prevent the party from committing the injury threatened, or from continuing the injury complained of. All such suits were termed "possessory suits" because the mode of proceeding was similar to the course pursued in ordinary possessory suits instituted merely for recovery of the possession of land.

24. This proceeding is in a great(e) measure peculiar to Ireland, probably originated in an instruction issued by the lord deputy and privy council of Ireland in the thirteenth year(f) of the reign of James the First to the lord president and council of Munster, authorizing and empowering them, if any(g) person, who had been

(a) *Watson v. Brophy*, 1 Law Rec. 468.

(b) *Practice of Chancery in Ireland*, 11; 1 How. Exch. Pr. 310; How. Ch. Pr. 41.

(c) *Wilson v. Stewart*, 2 How. Ch. Pr. 532; and see a decree of dismissal on the merits of a possessory bill to restore plaintiff to the possession of a mill-race, 1 Eq. Pleader's Assist. 333.

(d) See possessory bill, and interroga-

tories for this purpose, 1 Eq. Assist. 302.

(e) *Hughes v. Trustees of College*, 1 Vez. Sen. 183; *v. Palmer*, Moseley, 169; *7 Poinés's case*, 1 Vern. 156; Vez. S. 414.

(f) 20th May, 1615.

(g) 1 How. Exch. Pr. 305; 1 Ld. Irnham, 7 Bro. Parl. Ca. Code de Procedure Civile, No.

three years quietly in the seisin and possession of any lands, tenements, or hereditaments, either of freehold, or for any other term of years, within the province of Munster, should be riotously, forcibly, or unlawfully disseised, expelled, put out thereof, or holden out of the same, that in such cases, though the party aggrieved might have no remedy at law, they might, upon complaint thereof made to them by writ of *formosa*, make order for the settling, quieting, or restoring the lands and hereditaments, until the title or interest in the same was decided or tried by due course of law. This ordinance seems to have been framed according to the principles of the civil law, and in like manner to servitudes or incorporeal hereditaments. The period of *three* years mentioned in this instruction was evidently borrowed from the Statute(*i*), 8 Henry VI. c. 9, prohibiting forcible entry and the procedure being attended with beneficial effects in the Chancery courts, was adopted by the superior Courts of Equity.

The basis and foundation of this suit is a possession for *three* years prior to the forcible eviction, and a(*j*) title to the possession being long and undetermined, for although a possession be acquired by force or by fraud, if such possession be continued(*k*) uninterruptedly for *three* years, the party may maintain a possessory suit to be restored, and shall not be forcibly turned out, even by the rightful owner, without legal process. Upon the trial of an issue out of *Chancery*, in a possessory cause, the plaintiffs in the issue were suffered to go into possession of their title to the lands, and obtained a verdict; but on a writ of *habere facias*, ordered by Lord Jocelyn, then Lord Chancellor, the parties were (*l*) restricted to the question of a *triennial* possession, when a verdict was given in favour of the defendant, which was established by Lord Chancellor Bowes, and an injunction to the sheriff was decreed accordingly.

The tenants or occupiers(*m*) over-hold after the expiration of a lease, or refusing to restore the possession to the landlord or his agent, or where the possession has been fraudulently(*n*) be-

sesoires ne seront recevables, qu'elles auront été formées, et du trouble, par ceux qui, l'année au moins, étaient en paisible possession par eux ou les leurs, ou par un tiers, ou par un précaire.

Interdictum de vi et de vi armata, lib. 43, tit. 16, interdictum de vi armata, lib. 43, tit. 26.

8 Hen. VI. c. 9, English and Irish. *Prins v. Bond*, How. Chan. Pr. 27; and see Primate Boyle's

Rules and Orders, Rule 50, page 15, by O'Keeffe; *Hemphill v. M'Kenna*, 3 Dru. & Warr. 183; 6 Irish Eq. Rep. 57.

(*k*) 2 How. Exch. Pr. 533.

(*l*) *Aylmer v. Fitzgerald*, 1 How. Eq. Exch. 317.

(*m*) *Luttrell v. Lord Irnham*, 7 Bro. Parl. Ca. 388; How. Chan. Pr. 51.

(*n*) How. Chan. Pr. 51; and see *Ld. Glerawly v. Plunket*, How. Chan. Pr. Supplement, 188.

trayed by the occupiers to an adverse claimant, the fraud, or misconduct in detaining the possession, although actual violence be not used is deemed such constructive force as will entitle the landlord to recover possession in a possessory suit. A demand of possession should be made without delay after the expiration of the lease, if for a term certain, or if the lease depended on a life, as soon as the landlord was aware of the fall of the life, and before any rent, subsequently accruing, is received, and the bill to be restored must be exhibited within six months after the landlord was apprized of the determination of the interest.

26. A possessory bill neither prays a *subpœna*, nor requires an answer, and if filed against an(o) over-holding tenant, states the demise, the entry of the lessee, that his term expired on a certain day, the receipt of the reserved rent by the plaintiff for three years preceding the expiration of the lease, that the landlord's title is still in being and undetermined, and that possession was demanded on a specified day by the landlord, or by some person authorized by him for that purpose, which was refused, and that the lessee, or persons deriving under him, forcibly retain possession of the premises, and prays that an injunction may be directed to the *defendants*, commanding them to restore possession of the premises to the plaintiff, and in default of so doing, that an injunction be awarded to the sheriff of the county to put the plaintiff into possession, and that the defendants may abide such further order concerning the premises as the Court shall make for the plaintiff's relief.

The bill is merely intended to give the Court jurisdiction, and the affidavit verifying the facts is the material document on which the proceeding is founded, and must contain distinct and positive allegations of all matters necessary to maintain the suit: the affidavit to verify(*p*) a possessory bill against an over-holding tenant should state the demise and the time of its expiration, the title of the plaintiff to the rent and reversion, and that he and the person under whom he derives were in receipt of the rent reserved by the lease out of the demised premises for *three* years immediately previous to its expiration that his title is still in being and undetermined, that the defendants are in occupation of certain parts of the premises, and that the possession was demanded by the plaintiff, or by his authority, on some specified day, and that possession was refused; and, in consequence of an

(o) Practice of the Court of Chancery in Ireland, 9 and 55.

(p) *Luttrell v. Ld. Irnham*, 7 Bro.

Parl. Ca. 394; Practice of Chancery in Ireland, 55.

observation made by the(*q*) Master of the Rolls, it seems prudent to negative the existence of any new contract: if the lease were granted for a shorter(*r*) period than three years, it should be stated according to the fact, and will be sufficient. In a case of *forcible* possession the affidavit should state that the plaintiff, by himself or by his tenants, was in the actual, quiet, and peaceable possession of the premises for *three* years next preceding the disturbance, and his title is still in being and undetermined; and the affidavit must describe the nature of the force used in dispossessing the plaintiff, and must state that possession was demanded on a specified day, within six months after the eviction. In a possessory cause the bill is not allowed to be(*s*) amended, because the proceeding being summary, amendments might cause delay in the prosecution of the suit.

Upon the production of a sufficient affidavit, a certificate of the bill filed, and a copy of its prayer, the Court, without service of notice, will grant an(*t*) injunction, in nature of a summons, directed to the *defendants*, commanding them to restore the possession; and if the writ be disobeyed it becomes matter of *contempt*, and upon affidavit of service of the injunction on the party, and of his detaining the possession, or continuing the force and disturbance, and upon a certificate of no appearance, an injunction will be awarded to *the sheriff* of the county, which is in nature of an execution, commanding him to put the plaintiff into possession. Where a party is forcibly dispossessed of his(*u*) dwelling-house, or is deprived of the possession of his(*v*) land by extraordinary violence and without any justifiable pretence, upon very full and clear affidavits of the circumstances, an injunction will, in the first instance, be issued to the *sheriff*, commanding him to restore the possession.

27. If the defendants mean to contest the suit, an appearance must be entered for them, as upon an attachment, within *eight* sitting days after service of the injunction on the parties, and upon entering such appearance, and without filing any answer or affidavit, the defendant's attorney may obtain(*w*) a rule that the plaintiff shall file his personal interrogatories; and if such interrogatories be not filed within four days after service of the rule, the Court, upon affidavit of its service, and a certificate of no interrogatories being filed, will discharge the

(*q*) *Biddulph v. Molloy*, 2 Irish Eq. Rep. 228.

(*r*) 1 How. Eq. Exch. 312.

(*s*) *Malone v. M'Evoy*, Wallis's Rep. 319.

(*t*) *Luttrell v. Ld. Irnham*, 7 Bro. Parl. Ca. 395.

(*u*) *Smyth v. O'Shaghnessy*, 2 How. Exch. Pr. 903; see Appendix, Nos. 18, 19.

(*v*) How. Chan. Prac. Supplem. 25; *Biddulph v. Molloy*, 2 Irish Eq. Rep. 228.

(*w*) 1 How. Eq. Exch. 319.

injunction, which is, in effect, a dismissal of the bill. On filing the personal interrogatories, a rule is entered that the defendants *shall* answer them in four days, and unless an extension of the time for *that* purpose be obtained, the Court, upon affidavit of service of the rule and certificate of no answer, will award an injunction to the sheriff.

28. After the interrogatories are fully answered, the plaintiff will be ordered to proceed within a month, or some other period, to establish his case by proof, or that the injunction shall stand dissolved: if the plaintiff considers that sufficient matter is confessed by the answer of the defendants to the interrogatories, he may serve notice to that effect, and set down the cause for hearing on the bill, interrogatories, and answer; if, however, the plaintiff intend to dispute the facts alleged by the defendants, a notice must be served(*x*) that the plaintiff would proceed to prove his case, and requiring the defendants to substantiate the allegations constituting their defence by proof: this notice is in nature of a replication(*y*), and unless served on the defendants, they will be allowed to read, on the hearing of the cause, their own answers to the interrogatories, and need not make any further proof: after service of notice to examine, both parties must proceed with the examination of their witnesses, and, unless the time be enlarged, publication may be passed at the end of a month.

29. If a possessory cause become abated(*z*) by the death of any of the parties, a bill of revivor will not be permitted, and such defect cannot be supplied by amendment, nor will a demurrer to a possessory bill be allowed(*a*), because the defendant appears as upon an attachment.

30. The only necessary parties to a possessory(*b*) bill are those detaining the possession, as this proceeding cannot affect or prejudice the rights of third persons, or deprive them of any legal remedy, and if a person having *lawful* possession, who is not a defendant in the cause, be removed under the injunction, restitution will be awarded: if the defendant, on being served with the injunction to the *party*, give up possession, the suit is at an end(*c*), and no costs will be granted.

31. Occasionally, and more frequently in latter times, the Court only grants, in the first instance, a conditional order for an injunction

(*x*) How. Chan. Prac. 46; Pract. of Chancery in Ireland, 58; Sherrock v. Chartres, 2 Irish Eq. Rep. 230.

(*y*) How. Chan. Pr. 47.

(*z*) *Ld. Glerawly v. Plunket*, How. Ch. Pract. Supplem. 188; How. Ch. Prac. 51, S. C.

(*a*) *Stratford v. Richardson*, 1 How. Eq. Exch. 324.

(*b*) *Hiffernan v. Summers*, 1 How. Chan. Pr. 54.

(*c*) *Executors of Magee v. Hodgkinson*, 1 How. Eq. Exch. 318.

the possession, and the matter is finally disposed of on shew-
e by affidavit. Sir M. O'Loghlen observed that he found
ice of issuing an injunction to the *party* was inconvenient,
hat he preferred granting a conditional order for issuing
ctions; and he added, that the course of proceeding by pos-
ill ought not to be resorted to, unless in clear cases of over-
or forcible possession. Where a lease was made for thirty-one
h a clause of reassumption on giving twelve months' previous
e tenant having(e) refused to comply with a notice which
d in pursuance of the proviso, cause shewn by him, against
an injunction on a possessory bill, was allowed. On a
n by justices of the peace for a forcible entry, and after
awarded by them, further proceedings were suspended
val of the record(f) into the King's Bench by *certiorari*:
such proceedings, an injunction was granted in Chancery, on
ory bill, to restore the plaintiff, who had been forcibly evicted,
session.

n order to enable a plaintiff to maintain a possessory suit, a
and uninterrupted possession for three years immediately pre-
e disturbance must be shewn in the plaintiff, or those under
derives. Where a person dies intestate, seised of freehold es-
heir, or in case he dies possessed of a chattel real, his per-
esentatives may(g) connect their possession with the posses-
e former owner, from whom they respectively derive, so as to
a triennial possession: and if a lease were made by such for-
er, and the rent and reversion, on his decease, devolve on his
ersonal representatives, though they have not received, or may
titled to receive any rent out of the premises, yet, on the ex-
of the lease, they will be permitted to shew a triennial posses-
e preceding owner, so as to warrant the issuing of an injunc-
e overholding tenant. If a lease be made by a vendor, grantor,
r, the purchaser(h), grantee(i), or devisee(j) may unite his
n with the possession of his predecessors, and though the im-

lulph v. Molloy, 2 Irish Eq.
1 How. Eq. Exch. 235.
v. O'Grady, 2 Irish Eq. Rep.

wart v. Stewart, Wallis's Rep.

worth v. Edgworth, 2 Bro.
27-35; Lefroy v. Lee, Hayes
21.

(h) Gorman v. Brown, How. Chan.
Pr. Suppl. 189; Lefroy v. Lee, Hayes
& Jones, 721; see Appendix, No. 21.

(i) Lane v. Frewen, How. Ch. Pr.
55; Appendix, No. 20.

(j) Smith v. O'Shaghnessy, 2 How.
Eq. Exch. 903; See Appendix, No. 19;
Edgworth v. Edgworth, 2 Bro. Parl.
Ca. 27.

mediate owners may not have enjoyed the demised premises for three years prior to the expiration of the lease, yet they may sustain a possessory suit against an overholding tenant, provided the persons under whom they respectively derive had a triennial possession.

Where a landlord proceeds by possessory bill against his tenant for holding over after his term expired, which is a forcible, or rather a fraudulent^(k) detainer, an affidavit of triennial possession of a title still in being, is not requisite, as in other cases, because the bill is founded upon the fraud, and the tenant is considered in equity as a trustee for the landlord, and the refusal to restore possession on the expiration of the term is deemed fraudulent: in such cases, the landlord need only shew by affidavit that the demise was made and has expired, that the tenant holds over, and the possession was demanded.

33. On a possessory bill and affidavits, an injunction was granted *to the sheriff*^(l), commanding him to restore the plaintiff, as devisee of the estate in question, to the possession of the mansion-house, out of which, it appeared, he had been expelled by the defendant O'Shaghnessy, who claimed under some old dormant title, and not as heir at law: and an injunction was granted *to the party* as to the demesne, unless cause to the contrary: upon the defendant's shewing cause against the injunction to the party, and moving to set aside the injunction to the sheriff, the Court disallowed the cause as to the first point, and they refused to set aside the injunction to the sheriff, because it was an order of course, and usually granted, in the first instance, when the party had been turned out of his place of residence. Upon these motions^(m) the following points were determined: that the defendant should not read any affidavits to contradict the facts in the plaintiff's affidavits, or to shew any other cause than appeared on the face of the plaintiff's affidavits; and it was stated by counsel for the plaintiff to be the constant practice in Irish Courts of Equity, on these applications for injunctions *to the party*, not to suffer any affidavits to be read on the part of the defendant, unless there was uncertainty, insufficiency, or defect in the charging affidavit, as the injunction⁽ⁿ⁾ to the party was in nature of a summons to put the matter in

(k) 1 How. Eq. Exch. 312. It seems, however, in cases of this description, more prudent to follow the common form.

(l) *Smyth v. O'Shaghnessy*, 2 How. Eq. Exch. 903; see Appendix, No. 19, for the Notes of this case extracted from the Registrar's Book; *Stewart v. Stewart*, Wall. 97.

(m) Mr. Howard states in a note to his *Chancery Practice*, page 55, that this case, which is inserted in the Appendix to his treatise of the Equity side of the Exchequer, had been first perused by the then Chancellor, Lord Bowes.

(n) *Smyth v. O'Shaghnessy*, 2 How. Eq. Exch. 904; 1 How. Eq. Exch. 328.

of trial: it was also determined, that although the devisee had not a few days in possession, yet he was entitled to be restored on a possessory bill, and might take up, and count upon the possession of the testator, as it was not pretended that the defendant was heir at law. An objection to reading the charging affidavits, because they had not been made before the bill was filed, was overruled, the six clerks having declared it had been frequently done. An affidavit made by one subscribing witness to the execution of the testator's will, was held to be sufficient for the purpose of obtaining the injunction, and a declaration that the heir at law of the testator was not a party, was held to be of no weight, as he could not be prejudiced by the proceedings.

In a subsequent case, it was decided(o) that a devisee, who had been in possession for upwards of a year after his testator's decease, was not to be forcibly dispossessed by a person claiming part of the premises as the heir of his wife, who was one of the co-heirs of the testator, was not to be relieved in a possessory suit, and an injunction to the contrary was granted to put the plaintiff into possession.

So a person in remainder was awarded an injunction to the contrary against an overholding tenant, whose lease had expired on the death of the preceding tenant for life: William Gorman, and Martha, his wife, in the year 1749, by indenture, limited certain lands, the estate of the wife, to the husband(*p*) for his life, with remainder to the eldest son of the marriage, for his life, with remainder to the next sons over, and a fine was levied by the husband and wife. In the year 1750 the husband made a lease for his own life to the defendant, under which he and the other defendants, who were his under-tenants, enjoyed the premises: immediately after the expiration of this lease on the husband's death, the undertenants of the premises acknowledged the lease from one John Bond, who claimed by title adverse to the plaintiff, and the plaintiff, as being next in remainder, exhibited his possessory bill against Brown and his undertenants, to be restored to the possession: on the hearing of the cause, Lord Lifford, then Lord Chancellor, said, although it had not been decided whether a remainderman could maintain a possessory suit, and that the case was stated on the first impression, yet as the plaintiff's title was perfectly good, and the defendants did not pretend to have any title of their own,

Gorman v. Frewen, How. Chan. Pr. Pr. 189, in the Addenda; see Appendix, see Appendix, No. 20. No. 21, for the notes of this case extracted from the Registrar's book.
Gorman v. Brown, How. Chan.

but endeavoured to betray the possession, he declared them in contempt, and decreed an injunction to the sheriff to restore the possession.

Possessory bills against overholding tenants, or where possession of lands has been procured by force, or by fraud, are still occasionally resorted to, and many advantages may be derived from this mode of proceeding, on the expiration of a lease, where the lands have been let to numerous occupying tenants, or where the possession has been betrayed to an adverse claimant.

35. Possessory bills to be quieted in the enjoyment of an easement, or incorporeal hereditament, have become almost obsolete chiefly in consequence of the dismissal(*q*) of a bill of this description by Lord Manners, which was brought for the purpose of restraining the owner of adjoining ground from erecting any house or wall at the rear of the plaintiff's dwelling-house, by which the ancient windows at the rear of his house might be obstructed, and the owner of such house might be deprived of the free and customary enjoyment of light and air.

36. The form of a possessory bill, and the mode of proceeding in suit for the purpose of obtaining an injunction(*r*) in nature of a writ of *estrepement* to stay waste, are the same as in other possessory suits, and are frequently and judiciously resorted to, where the commission of waste has only been threatened, or where, from the poverty of the defendant, or from the nature of the waste complained of, the plaintiff seeks merely to put a stop to the mischief, and does not require an account, or compensation for the injury committed. The affidavit to verify the bill must allege positively that the waste complained of has been actually committed by the defendant, or by his orders, or that the defendant has made specific threats to commit the waste, or has made preparations for doing so, and the affidavit must state positively at what time, or how long prior to filing the bill, the injury(*s*) was done, or was threatened, because the Court requires that the complaint shall be made without unnecessary delay: the affidavit must also disclose some privity of estate between the parties, such as that of landlord and tenant, or of tenant for life and remainder-man, and that the waste committed was a violation of such relation. A suit of this nature will not lie against a mere trespasser, unless the mischief be done by open force or under an assertion of right.

(*q*) *Fletcher v. Manders*, in Chancery. Hil. 1818.

(*r*) 1 How. Eq. Exch. 322; How.

Chan. Pr. 47, 48.

(*s*) See *Morris v. Morris*, 1 Hogg 238.

Upon the production of the usual affidavit, a certificate of the bill filed, and the prayer of the bill, an order will be made to restrain the defendants from committing the waste complained of, unless cause shewn(*t*) in a limited time prescribed for that purpose, and if warranted by the facts alleged, the defendants will be restrained from committing waste in the mean time. If the fact of committing the waste be disputed, or a right to do so be claimed, the whole matter may(*u*) be brought before the Court on affidavit to shew cause: if either party do not choose to acquiesce in the order made on shewing cause, the suit may be prosecuted to a hearing, as upon other possessory bills, but the case must be very peculiar which would justify so hazardous a proceeding.

(*t*) How. Chan. Pr. 49, 3rd March, 1735, General Order.

(*u*) Howard, Chan. Pr. 49.

CHAPTER III.

PROCEDURE IN EJECTMENT.

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| 1. <i>Ejectments introduced for the Benefit of Lessees for Years.</i> | 10. <i>Demises must be framed to the Nature of Lessee.</i> |
| 2. <i>Remedy by Ejectment extended to Recovery of the Freehold.</i> | 11. <i>Advantages of stating demises.</i> |
| 3. <i>Modern Mode of Proceeding.</i> | 12. <i>When Demise may be laid in Lessee's Name.</i> |
| 4. <i>Who may defend Ejectment.</i> | 13. <i>Statement of Lease and Demise.</i> |
| 5. <i>Proceedings after Defence taken.</i> | 14. <i>Declaration, when to be served and how entitled.</i> |
| 6. <i>Advantages afforded by this Remedy.</i> | 15. <i>Statute 1 & 2 Will. IV. c. 12 and 13.</i> |
| 7. <i>Venue in Ejectment local, unless changed by special Order.</i> | 16. <i>Description of the Property.</i> |
| 8. <i>Ejectment for Premises lying in corporate Town.</i> | 17. <i>Locality of the Premises.</i> |
| 9. <i>Demise in Ejectment must be laid after the Right of Entry accrues.</i> | |

1. AN ejectment is the mode of legal proceeding usually resorted to for recovery of the possession of lands. This action, *de firma*, was introduced during the reign of Edward the Third for the purpose of enabling (a) a tenant for a term of years, who had been unlawfully dispossessed, to recover damages, to the amount of the mesne profits of the premises, for the injury sustained, and to restore him to possession. Later (b) the period was extended as a remedy to restore him to possession. It was formerly the practice for the claimant to make actual entry on the premises sought to be recovered, and to seal a lease for a while upon the land, a lease for years to a bailiff or agent who remained there until he was ousted by the person previously in possession, or by some other person coming upon the land, either by force, or by arrangement which was often (c) fraudulently or collusively made for that purpose: a writ of trespass and ejectment was then served upon the *casual ejector*, and if the plaintiff's right to possession was established, he obtained judgment for his damages and for recovery of his term. In order to prevent a collusive proceeding between the claimant and the *casual ejector*, it was required that the ejectment should be served upon the persons in the actual possession.

(a) Bac. Abr. Ejectment, A.; Adams on Ejectment, 7.

(b) Circa annum 1461, temp. Regis Edw. quarti, Year Book, 7 Edw. IV. fo. 5, pl. 16; and 21 Edw. IV. fo. 11,

plac. 2.

(c) Holderstaffe v. Saunderson, 16; Holt, 136; Saunders v. Smith, 6 Mod. 73, S. C.

who were permitted by the Court(*d*) to defend the suit, upon indemnifying the defendant, or *casual* ejector, against costs.

2. The right of the freeholder to recover possession was the subject of an assize, or real action, and the writs of entry and assize only lay against the freeholder, because tenants for years were considered to have such precarious interests that they ought not to be intrusted with the defence of the land; but after the right of a tenant for years to recover possession by means of an ejectment was firmly established, the freeholder, in order to escape from the technical difficulties incident to real actions, was permitted to try his title in an action of ejectment, by making a lease for years to any person, and, if successful, the law attributed the lessor's possession to his prior title: the proceeding in ejectment had also the advantage over real actions, that the unsuccessful party was not concluded by a single verdict, but might renew his claim by a second suit.

3. The method of proceeding now in use was introduced by Lord Chief Justice Rolle, during the Commonwealth, and is founded entirely in fiction, though framed according to the old practice. By the present system, no lease is executed, nor entry made, but a declaration, or summons in ejectment, is served upon all persons in possession, or having any estate in the premises, by which John Doe, a fictitious personage and the nominal plaintiff, complains that J. S., the real claimant, had demised the premises to him, the said John Doe, for a term of [ten] years then unexpired, by virtue whereof John Doe entered and continued in possession until he was afterwards ejected by John Thrustout, the casual ejector: a notice, signed with the name of the *casual ejector*, is annexed to the declaration, informing all persons interested that he does not claim any title to the lands, and advising them to defend the suit, otherwise he will suffer judgement to pass by default, and they will be deprived of the possession.

4. Any person served with the declaration in ejectment may, within the time limited for that purpose, appear by his attorney and take defence; or the Court will, upon motion, allow any person, though not served, either claiming as landlord or shewing any(*e*) other reasonable title, to defend the ejectment, upon the *implied* conditions, that at the trial of the case he shall confess, *first*, that the lessor of the

(*d*) Anon. Style, 368; Hil. 1652; if one move that the title of land doth belong to him, and that the *plaintiff* has made an ejector of his own, and thereupon prays that, giving security to

the ejector to keep him harmless, he may defend the title, this Court will grant it.

(*e*) Lessee Geale v. Hurst, Hayes & Jones, 751, by an insolvent debtor in possession.

plaintiff made a lease to the feigned lessee corresponding with the demise laid in the declaration ; and, *secondly*, that the nominal plaintiff, or feigned lessee, entered upon the lands and was ousted by the defendant.

5. After defence taken, a second declaration is filed, which is entitled of the same term as the defence, substituting the name of the real defendant for that of the casual ejector, and inserting a plea of not guilty for the defendant : the cause then proceeds to trial under the name of John Doe, the nominal plaintiff, on the demise of J. S., the real claimant, against the new defendant. If the claimant or lessor of the plaintiff, upon the trial, make out his title to the possession, a verdict will pass for the nominal plaintiff, on which judgement may be entered, and a writ of possession will be issued commanding the sheriff to put the real claimant into possession.

However, if, after defence taken, the defendant do not appear on the trial, the nominal plaintiff will be nonsuited for not proving the *supposed* lease, entry, and ouster, and, in that case, judgement will be entered against the *casual ejector*, because the condition, on which the real defendant was made a party to the suit, being violated, the plaintiff is placed in the same situation as if there had been no defence, and an attachment will be awarded against the real defendant for the costs of the suit : if no defence be taken to the ejectment, upon the expiration of the usual rules, judgement is entered for the nominal plaintiff against the *casual ejector*.

6. The remedy by ejectment is attended with the peculiar advantage, that by laying several demises in the names of different persons, difficulties which otherwise might be encountered, in tracing the legal estate in evidence, may be avoided, because the nominal plaintiff or feigned lessee, represents the estate in the premises, which every person, in whose name a demise has been laid, is competent to grant. An ejectment always treats the tenant in possession as a wrong-doer *at the time* when the action is brought, and as the proceeding is(*f*) altogether fictitious, if the tenant were then lawfully in possession, it will afford an answer to the action, whatever may be the date of the demise laid in the declaration.

A judgement in ejectment is a recovery of the *possession*, not of the seisin, or freehold, without prejudice to the right, as it may afterwards appear, even between the parties : he who enters under it, in truth and substance, can only be possessed according to right, *prout lex postu-*

(*f*) Doc *dem.* Newby v. Jackson, 1 B. & Cress. 454 ; 2 Dow. & Ry. 514.

he has a freehold, he is in as a freeholder ; if he has a chattel he is in as a termor ; and in respect of the freehold, his pos-
sures according to right : if he has no title, he is in as a tres-
passer without any re-entry by the true owner, is liable to account
of profits.

The action of ejectment is local(*h*), and the venue in the declara-
tion must be laid in the county where the premises sought to be re-
covered are situated, because the writ of possession must be directed
to the sheriff of the county in which the lands lie, as a sheriff of one
county cannot deliver possession of lands lying in a different county ;
it is shewn, to the satisfaction of the Court, that a fair trial can-
not be had where the venue has been laid, permission will be granted to
change the venue in some other county(*i*), in which justice may be impartially
administered between the parties, and to enter a proper suggestion on the
record for that purpose. After verdict for the defendant on the trial of an
ejectment for lands in the county of the city of Limerick, the Court of
Commons(*j*) set aside the verdict, and ordered the case to be tried in the
County of Cork : so in an ejectment for lands in the county of Leitrim,
after several trials, in which the juries were unable to agree, and where it
was shewn that a considerable degree of excitement existed in the county
subject, the King's Bench(*k*) ordered that the jury-process
be issued to the county of Galway. Upon an ejectment brought
in the county of Wexford, an entry was made on the roll, that
in order to have an impartial trial the venue should be changed into
Queen's County, and after verdict, by a jury of the latter county
the judgment, error(*l*) was assigned in the King's Bench of England,
that an ejectment was a *real* action, and could not be tried, even
in a foreign county ; but upon a certificate that such trials
were impracticable in Ireland, on account of the state of the country, the ex-
ception was disallowed.

Where an ejectment is brought by or against a corporation for
land lying in a county of a city, or town, the venue is always changed
to the adjoining county, in consequence of the difficulty of pro-
curing jurors free from interest in the subject of the suit : and by the

Saylor dem. Atkins v. Horde, 1
4, by Ld. Mansfield.

Mayor, &c. of London v. Cole, 7
18.

dem. Lewis v. Ld. Cawdor, 4
52 ; and see *Lofft's Rep.* 50.

see *Neville v. O'Brien*, *Exch.*
see *Keon v. Keon*, 3 *Law Rec.*

137, 2nd series ; *Lessee Dowdall v. Dow-*
dall, 1 *Law Rec.* 355, 1st ser. ; and see
Lessee Jackson v. Lodge, 1 *Irish Law*
Rep. 161.

(*l*) *Stafford v. Mac Donnogh*, *Pal-*
mer, 100 ; 2 *Ro. Rep.* 166 ; 18 *Jac. I.*
A. D. 1620.

Irish Statute(*m*), 3 & 4 Vict. c. 105, s. 47, after reciting that unnecessary delay and expense are sometimes occasioned by the trial of local actions in the county where the cause of action has arisen, *it is enacted* that in any action depending in any of the superior courts, the venue which is by law local, the court in which such action shall be depending, or any judge of any such courts, may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid: and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place. If the county stated in the body of a declaration(*n*) in ejectment be correct, the insertion of a wrong venue in the margin is unimportant; a motion to change the venue under the Statute cannot be entertained in an action of ejectment(*o*) until after the issue joined by taking defence.

9. The demise in the declaration must be laid on some day after the right of entry accrued to the claimant, for if the lessor of the plaintiff had no right to enter, he could have no title to make the demise: it is usual to lay the day of the demise as far back as the lessor's title warrants, because(*p*) the judgement in ejectment is conclusive evidence of the title of the lessor of the plaintiff in an action for the mesne profits accruing subsequently to the day of the demise; if it be uncertain when the claimant's title accrued, separate demises may be laid in his name on different days: however, where the ejectment is brought for non-payment of rent, the demise should be laid after the rent became payable, and shortly previous to the time of the intended service of the writ of ejectment.

As a forfeiture for nonpayment of rent is not incurred, under the Ejectment Acts, prior to the service of the summons in ejectment which was substituted for demand and re-entry at common law, it was contended that the demise should be laid on the day(*q*) of effecting the service, and that an ejectment for non-payment of rent, laying the de-

(*m*) 3 & 4 Vict. c. 105, s. 47, Irish; 3 & 4 Will. IV. c. 42, s. 22, English; and see the Irish Statute, 6 Geo. IV. c. 51, s. 2, as to local venues in corporate towns.

(*n*) Doe *dem.* Goodwin *v.* Roe, 3 Dowl. Pr. Ca. 323.

(*o*) Bell *v.* Harrison, Tyrw. & Gr. 1082 and 193; 2 Cro. M. & Rosc. 733;

4 Dowl. Pr. Ca. 181, S. C.

(*p*) Buller's N. P. 87; Aslin *v.* Parker, 2 Burr. 665; 2 Ld. Kenyon, 378; Dodwell *v.* Gibbs, 2 Carr. & P. 615.

(*q*) Doe *dem.* Lawrence *v.* Shawcross, 3 B. & Cress. 752; 5 D. & Ry. 711, S. C.

mise on a day prior to such service, could not be supported, but it was decided that the service of the summons in ejectment was, by the provisions of the Statute(*r*), to stand in the place of a *legal* demand on the day when it should have been effected at common law, and that after such service, the parties were in the same situation as if a formal demand had been duly made. The demise must be laid on some day prior to the service, for if laid on a subsequent day, it would appear on the evidence, that the nominal plaintiff had no title at the time of the service, and where the right of re-entry is postponed by the stipulations of the lease for a certain number(*s*) of days after the rent has become due, the demise should be laid on some day after such period has elapsed.

In an ejectment against a tenant from year to year, the demise must be laid on some day after the determination of the holding by notice to quit, and if brought to defeat a tenancy at will(*t*), the demise should be laid at some time after demand of the possession: where a notice was served requiring a tenant to quit on the 1st of November, if the tenancy commenced on that day, or if not, then at the end of the year of the tenancy, which should expire next after the end of half a year from the service of the notice, it was ruled(*u*), that a demise in ejectment, founded on this notice, which was laid on the 1st of November, was premature, as the *primâ facie* effect of the notice was to allow the entire day for giving up possession. In an ejectment on the demise of an heir by descent, whose ancestor died at five o'clock in the morning of the 1st of January, the demise in the declaration was laid on the day of the ancestor's death to hold from a day preceding, and it was contended, that there being no fraction of a day in law, the lessor's title did not accrue(*v*) until the following day, but the Court held, that if a man's ancestor die at five o'clock in the morning, the heir may enter at six o'clock, and may make a valid demise at seven o'clock on the same day, which will support an ejectment: and on the authority of the preceding case, an ejectment(*w*) founded on a disclaimer of the landlord's title, in which the demise was laid on the same day when the forfeiture occurred, was deemed sufficient.

(*r*) 11 Anne, c. 2, Irish; 4 Geo. II. c. 28, English.

(*s*) Doe *dem.* Lawrence *v.* Shawcross, 3 B. & Cress. 755; 5 D. & Ry. 711; 2 How. Law Exch. 65; but see Lessee Keiley *v.* Ahearne, Batty, 18; Lessee Cassan *v.* Clarke, Exch. Tr. 1844.

(*t*) Goodtitle *dem.* Gallaway *v.* Herbert, 4 T. R. 680; Denn *dem.* Brune *v.*

Rawlins, 10 East, 261.

(*u*) Doe *dem.* Lynas *v.* Hampton, 2 Jebb & S. 448; 3 Irish Law Rep. 304.

(*v*) Roe *dem.* Wrangham *v.* Hersey, 3 Wils. 274.

(*w*) Doe *dem.* Graves *v.* Wells, 2 P. & Dav. 396; 10 Ad. & Ell. 427; and see Cutting *v.* Derby, 2 W. Bla. 1075.

A demise by an administrator may be laid on any day after the intestate's death, and even(*x*) before the grant of letters of administration, because the grant relates back to the time of the intestate's decease: and in like manner, a demise in the name of an executor will be valid, though laid on a day before(*y*) the testator's will has been proved. The demise in an ejectment grounded on an *elegit*, must be laid on some(*z*) day after the date of the inquisition. A demise in ejectment being laid on the 31st day of October, without mentioning any year, it was ruled(*a*) that such an omission did not afford any ground of nonsuit, and that the defendant's proper course in such a case, is to apply to the Court to compel the lessor of the plaintiff to insert the correct date.

As a corporation aggregate can only demise by deed, it was formerly considered, that in order to maintain an ejectment, they should constitute an attorney under their common seal, who was to execute a lease upon the lands claimed, but it is now held unnecessary either to state in an ejectment(*b*), or to prove on the trial, that the formal demise to the nominal plaintiff in a declaration in ejectment, even for the recovery of tithes, was made by deed.

10. Though the demises laid in the declaration in ejectment are fictitious, still they must be framed in such a manner as the title of the several lessors will warrant: where joint-tenants or co-parceners are lessors of the plaintiff, the demise(*c*) should, according to strict rule, be laid jointly, but several demises in the name(*d*) of each joint-tenant for the entire premises, will be deemed sufficient: if a demise be laid in the name of one joint-tenant alone, or in the name of one alone out of several trustees, who are jointly entitled, claiming the whole premises, such person may recover his share of the lands, because he severs(*e*) the title by the act of making a separate demise in ejectment, and constitutes himself a tenant in common. Sir Vicary Gibbs, when attorney-general, stated that the rule was formerly considered to be,

(*x*) Lessee Patten *v.* Patten, Alc. & Nap. 493; 1 Williams's Executors, 433, note (1); 2 Selw. N. P. 725.

(*y*) Roe *dem.* Bendall *v.* Summerset, 2 W. Bla. 692.

(*z*) Jack *dem.* Johnston *v.* Stewart, Smith & B. 369.

(*a*) Doe *dem.* Parsons *v.* Heather, 8 Mees. & W. 158.

(*b*) Furley *dem.* Corporation of Canterbury *v.* Wood, 1 Espin. N. P. C. 128; Partridge *v.* Ball, 1 Ld. Raym. 136;

Carth. 390.

(*c*) 2 Selw. N. P. 724, note 20; Bonner *v.* Juner, 1 Ld. Raym. 726.

(*d*) Doe *dem.* Lulham *v.* Fenn, 3 Campb. N. P. C. 190; Doe *dem.* Whayman *v.* Chaplin, 3 Taunt. 120; Doe *dem.* Aslin *v.* Summersett, 1 B. & Adol. 140, by Ld. Tenterden.

(*e*) Doe *dem.* Marsack *v.* Read, 12 East, 61; Doe *dem.* Raper *v.* Lonsdale, 12 East, 39.

though he never heard any reason assigned for it, that in laying(*f*) demises in ejectment, tenants in common must sever, joint-tenants must join, and parceners might either join or sever; but if joint-tenants might sever, it seemed difficult to say why tenants in common might not join, as each might still be taken to have demised according to his legal interest. However, it is now settled, that persons deriving by several and distinct titles cannot maintain an ejectment on a joint demise to the nominal plaintiff: the old law certainly was, that in all real actions, tenants in common should sever, and ever since the mode of recovering land(*g*) in mixed actions, the same rule has been observed: separate demises must, therefore, be laid in the name of each tenant in common, or all the tenants in common may join in granting a lease to a third person(*h*), on whose demise to the nominal plaintiff an ejectment may be sustained. Upon the trial of an ejectment brought on a joint demise by A and B, it appeared that A was tenant for life, with remainder to B, and that both of them had joined in a lease by indenture to the nominal plaintiff, and on a special verdict(*i*), judgement was given for the defendant, because the indenture is the lease of A during his life, and the confirmation of B: and on the same principle, an ejectment on the joint demise of mortgagee(*j*) and mortgagor cannot be supported. Where it appeared that an entire rent had been paid to the clerk of several trustees of a charity, who were appointed at different times, such payment was ruled(*k*) to be an admission that the party held under them jointly, and was sufficient to support a joint demise, unless it were expressly proved that the trustees were entitled in a different manner.

11. It is often difficult to ascertain in whom the legal estate, sought to be recovered, is vested, or what title may be found most easy of proof upon the trial of an ejectment, and, in such cases, it is customary to insert in the declaration several distinct demises in the names of the persons interested, so as to enable the claimant to avail himself of any particular demise, by means of which he shall be able to establish his title: where lands have been granted in mortgage, or

(*f*) Doe *dem.* Lulham *v.* Fenn, 3 Camp. N. P. C. 190.

(*g*) Doe *dem.* Poole *v.* Errington, 1 Ad. & Ell. 750; 3 Nev. & M. 646; Mantle *v.* Wellington, Cro. Jac. 166; Blackasper's case, Noy, 13; Doe *dem.* Blight *v.* Pett, 11 Ad. & Ell. 853; 4 P. & Dav. 278; Co. Litt. 45, A., note 267; 2 Selw. N. P. 725, note 21; Lessee M'Auley *v.* Molloy, 4 Irish Law Rep. 360.

(*h*) Buller's N. P. 107.

(*i*) Treport's case, 6 Rep. 14, B.

(*j*) Doe *dem.* Barney *v.* Adams, 2 Tyrw. 289; 2 Cro. & Jerv. 232; Doe *dem.* Barker *v.* Goldsmith, 2 Tyrw. 710; 2 Cro. & Jerv. 674, S. C.; and see Lessee M'Auley *v.* Molloy, 4 Irish Law Rep. 360.

(*k*) Doe *dem.* Clarke *v.* Grant, 12 East, 221.

made the subject of a family settlement, subsequently to making the lease or to the creation of the tenancy, it is prudent not only to lay a demise in the name of the person in receipt of the rents, but also demises in the names of the mortgagee, and of the trustees of the settlement. In filling up ejectments, care should be taken to state the demises, so as to guard against the accidental or unexpected absence of a witness: in an ejectment by the assignee of the reversion, or by a devisee under an undisputed will, it is often expedient to lay a demise in the name of the assignor in one case, and in the name of the testator's heir at law in the other instance. So, if any doubt exists, whether parties are joint-tenants or tenants in common, a demise should be laid in their names jointly, as well as a separate demise in the name of each individual.

12. Demises are usually laid in the names of trustees, without requiring any authority or permission for the purpose, as a *cestui que trust* is warranted in using the names of his own trustees, or of persons not claiming *(l)* adversely to him, but the attorney who institutes such proceedings, as well as his client, will be restrained from prosecuting the suit, until the persons whose names are used without their privity have been indemnified against costs. If there is a dispute about the inheritance, a trustee has a right to take which side he pleases, and neither party *(m)* can compel him to lend his name: suppose a person dies, and a doubt to exist who was his heir, neither party could compel a trustee, in whom the legal estate was vested, to allow his name to be used for the purposes of an ejectment: however, in a mere dispute between landlord and tenant, and where there is no controversy about the ownership, the landlord may use the name of a trustee, on indemnifying him. Where a verdict in ejectment was obtained solely on the demise of a party, whose name was used without his authority *(n)*, and his concurring in the suit, the verdict was set aside on his affidavit.

If the name of a person be used as one of the lessors of the plaintiff, without his privity or knowledge, though the party interested in bringing the ejectment has a right to retain the demise, he will be restrained from proceeding *(o)* in the cause, until security shall be given for costs, but an individual, in whose name a demise is laid without his permission, cannot execute any valid *(p)* release of the action, and

(l) Doe *dem.* Vine *v.* Figgins, 3 Taunt. 440.

(m) Doe *dem.* Prosser *v.* King, 2 Dowl. Pr. C. 580; Lessee Wallace *v.* Ejector, 2 Law Rec. 394, 1st series.

(n) Doe *dem.* Hammek *v.* Fillis, 2

Chitty's Rep. 170.

(o) Lessee Beatty *v.* Frith, Batm. 295; Doe *dem.* Shepherd *v.* Roe, Chitty's Rep. 171.

(p) Doe *dem.* Byne *v.* Brewer, 4 T. & Selw. 300; 2 Chitty's Rep. 323.

the Court can only consider the parties upon the record as the real parties to the suit, and, therefore, the nominal plaintiff would alone be qualified to release. Where a person is named one of the lessors of the plaintiff without his knowledge, and the suit is carried on without his privity, he cannot be made answerable(*q*) for costs awarded to the defendants in the cause, and the only remedy for recovery of such costs lies(*r*) against the attorney, who used the party's name without his authority.

13. Demises in ejectment are usually alleged to be made for ten years, and though the lessor of the plaintiff be only tenant from(*s*) year to year, he may declare upon a demise of longer duration than his own estate in the premises, the statement being wholly founded in fiction. The ouster need not be alleged to have occurred on any(*t*) particular day, provided it appears by the declaration to have taken place subsequently to the commencement of the term for years stated in the declaration, and prior to bringing the action. Where all the demises in an ejectment are laid on the same day, a statement of a single entry and ouster will be sufficient, but if demises are laid on different days(*u*), the declaration ought to allege as many entries and ousters as the dates of the demises shall require: upon the trial of an ejectment, in which one demise was laid on the 1st of November, 1819, and another demise on the 2nd of November, 1825, and only a single ouster was alleged, which was applicable to the latest demise; the Court ruled that the lessor of the plaintiff could not succeed on the first demise, because no ouster was alleged prior to the second demise, and, therefore, could not have been confessed by the consent rule.

14. The declaration and summons in ejectment are synonymous terms, but the latter expression has been adopted in the Irish Ejectment Acts(*v*), and is generally used in affidavits of the service of ejectments in Ireland: copies of the declaration or summons must be served on the persons in possession, and upon all others claiming any estate in the premises sought to be recovered, and such service(*w*) should be effected during a vacation intervening between two terms; and in such cases the declaration should be entitled as of the term next pre-

(*q*) Lessee Odell *v.* Odell, 1 Jones's Rep. 80; Doe *dem.* Keon *v.* Keon, Jebb & B. 194; Robson *v.* Eaton, 1 T. R. 62; Peed *v.* Cussen, Hayes, 66, in Equity; Adams, 211.

(*r*) Lessee Ld. Trimlestown *v.* Kemmis, 5 Irish Law Rep. 432.

(*s*) Doe *dem.* Shore *v.* Porter, 3 T. R. 13-17.

(*t*) Bull. N.P. 106; Adams *v.* Goose,

Cro. Jac. 96; Morrell *v.* Smith, Cro. Jac. 311; Davis *v.* Purdy, Yelv. 182.

(*u*) Lessee Ld. Ferrard *v.* Agnew, Batty, 288.

(*v*) 11 Anne, c. 2, Irish.

(*w*) See the Appendix to the Reports of Smith & Batty, 464, and the observations of Hayes, in the note to his Reports, 275.

ceding the time of the service, but it cannot regularly be served on any day intervening(*x*) between the Thursday next before, and the Wednesday next after Easter-day, when such period occurs in Easter Term, as the practice of the Court requires that the service should be made prior to the commencement of the term: where a formal party was served with the copy of an ejectment on the first day of term(*y*), the Court refused to allow such service to be received as of the preceding day.

The demises in an ejectment may be laid on a day later than the term of which the declaration is entitled, and such must(*z*) necessarily be the case, when the right of the lessor of the plaintiff accrues during the vacation in which the ejectment is brought, and the error is utterly immaterial, as the nominal defendant, or casual ejector, cannot demur; and a person taking defence is only permitted to plead the general issue: even though the declaration be not entitled of(*a*) any term, or of a wrong term(*b*), or omit the year(*c*) of the demise, the mistake does not vitiate the proceeding, provided the service be made in due time, and the notice to appear(*d*) be correct, because when defence is taken, the party accepts a good declaration; and a rule for judgement against the casual ejector was granted, where the declaration was entitled of a term not then arrived(*e*), and the notice had no date. If an ejectment be brought for nonpayment of a year's rent falling due on the 29th of September, and the demise is laid on the 10th of October following, the declaration should be entitled as of the preceding Trinity Term, and the notice annexed should require an appearance to be entered in the ensuing Michaelmas Term, but the declaration must not be served until after the day of the demise.

The insertion of the name of the tenant in possession by mistake in the declaration in ejectment, instead of the name(*f*) of the casual ejector, does not prevent the lessor of the plaintiff from obtaining a rule for judgement. The omission of the name either of counsel(*g*) or

(*x*) Doe *dem.* Frodsham *v.* Roe, 6 Dowl. Pr. Ca. 479.

(*y*) Lessee Voidal *v.* Ejector, Longf. & T. 107.

(*z*) Adams, 208; 2 Chitty on Plead. 877, in the note.

(*a*) Goodtitle *dem.* Price *v.* Badtitle, Adams, 207.

(*b*) Goodtitle *dem.* Ranger *v.* Roe, 2 Chitty's Rep. 172.

(*c*) Doe *dem.* Parsons *v.* Heather, 8 Mees. & W. 158; 1 Dowl. Pr. Ca. 64, N. S.; Small *dem.* Baker *v.* Cole, 2 Burr. 1159.

(*d*) Doe *dem.* Wills *v.* Roe, 5 Dowl. Pr. Ca. 380; 1 Will. W. & D. 76, S. C.

(*e*) Doe *dem.* Woodroffe *v.* Roe, 4 Mann. & Gr. 810, and the note; Doe *dem.* Greene *v.* Roe, 8 Scott, 385; Doe *dem.* Crooks *v.* Roe, 6 Dowl. Pr. Ca. 184.

(*f*) Doe *dem.* Dickinson *v.* Roe, 9 Dowl. Pr. Ca. 363.

(*g*) Lessee Sullivan *v.* Ejector, Hayes & Jones, 193; 1 Law Rec. 60, 2nd ser.; Lessee Hempenstall *v.* Ejector, 6 Law Rec. 390.

i) to the copy of the declaration for service affords no ground on, for if the tenant take defence the defect is cured, and appearance the objection cannot be raised, and the second will not be received unless the names of counsel and attorney be annexed.

landlords, to whom a right of entry into lands, tenements, and hereditaments accrued during, or immediately after the issuable term, and who were formerly unable to prosecute ejectments against their tenants, as to have a trial at the assizes next ensuing, by which such delay was occasioned in the recovery of possession of such lands, tenements, or hereditaments wrongfully withheld by tenants against their landlords; but by the Irish(i) Statute, 1 & 2 Will. IV. c. 31, it is enacted that in actions of ejectment thereafter to be brought in any of the superior courts at Dublin by any landlord against his tenant, or by any person claiming through or under such tenant, for the recovery of any lands, tenements, or hereditaments, where the tenancy is a lease for years, or the right of entry in, to, or upon such lands, tenements, or hereditaments, shall(j) accrue to such landlord in or after Trinity Terms respectively: it shall be lawful for the lessor to bring an action of ejectment in any such action, at any time *within ten days* after the tenancy shall expire, or right of entry accrue, to serve a declaration of ejectment entitled of the day next after the day of the demise of the tenancy, whether the same shall be in term or in vacation, with notice thereunto subjoined, requiring the tenant or tenants in possession to appear and plead thereto within ten days, in the court in which such action shall be brought, and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been served before the preceding term: provided that no judgement shall be signed against the casual ejector until default of appearance within such ten days, and that at least six clear days' notice shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried: and any stay or adjournment in such action may, at any time before the trial thereof, be granted by a judge of either of His Majesty's superior courts, by summary process in the usual way, for time to plead, or for staying or setting aside proceedings, or for postponing the trial until the next assizes;

dem. Simpson v. Roe, 6 1 Will. IV. sess. 1, c. 70, s. 36, English.
Ca. 469. (j) Doe v. Roe, 2 Cro. & Jerv. 123;
1 Will. IV. c. 31, s. 12, Irish; 1 Dowl. Pr. Ca. 304.

and the judge, in his discretion, may make such order in the case to him shall seem expedient.

Prior to this enactment, where a tenancy determined, either by the expiration of the term or by notice to quit, or where a right of re-entry accrued by nonpayment of rent or other means, during the term, the landlord could not have recovered possession by ejectment until the following Easter Term, but, by pursuing the provisions of the Act, possession may be recovered in the ensuing Michaelmas Term, and if summary execution be awarded, immediately after the Session of the Assizes. Although the Statute requires that at least six days' notice of trial shall be given, such notice need not be proved on the trial, if it is not made a condition precedent to the plaintiff's right of entry: the appearance of the defendant on the trial waives any irregularity in the service of the notice; but the want of due notice, if not cured by the defendant's appearance, would afford ground for application to set aside the verdict. Where the right of entry accrued before the commencement of Trinity Term, and the case did not come within the Act, it was ruled that by proceeding under the Statute the party was only guilty of irregularity, which could not be taken advantage of at *Nisi Prius*. The remedy given by the Statute does not extend to the recovery of lands situated either in the city of London or in the county of the city of Dublin.

16. An ejectment may be maintained for any corporeal hereditament, or for any property capable of being delivered under a writ of possession. Great precision was formerly required in describing the premises in an ejectment, for the purpose of enabling the sheriff to restore the possession; but it is now settled that the lessor plaintiff must, at his peril, cause the lands of which he demands possession to be pointed out to the sheriff; and if more land be taken to the party than was duly recovered, the Court, upon a summary application, will award restitution of the excess. An ejectment lies to recover possession of a messuage, a house, or a part of a house, a warehouse, a room, or a bed-chamber in a house, a stable

(*k*) *Doe dem. Antrobus v. Jepson*, 3 B. & Adol. 402; *Doe dem. Thompson v. Hodgson*, 12 Ad. & Ell. 135; 4 P. & Dav. 142; 2 Moo. & Rob. 283.

(*l*) *Doe dem. Rankin v. Brindley*, 1 Nev. & M. 1; 4 B. & Adol. 84.

(*m*) *Doe dem. Norris v. Roe*, 1 Dowl. Pr. Ca. 547.

(*n*) *Cottingham v. King*, 1 Burr. 623; *Connor v. West*, 5 Burr. 2672.

(*o*) *Hollingsworth v. Brewster*, 1 Salk. 255.

(*p*) *Royston v. Eccleston*, 1 C. & J. 654; Palm. 337.

(*q*) *Sullivan v. Seagrave*, 1 St. Tr. 554; *Rawson v. Maynard*, Cro. Eliz. 554.

(*r*) *Sprigg v. Rawlinson*, 1 C. & J. 554.

(*s*) 3 Leon. 210, case 275.

(*t*) *Lady Dacre's case*, 1 Lev. 111.

orchard(*u*), garden, cottage(*v*), or a corn-mill(*w*), without specifying its quality, whether windmill or watermill.

An ejectment, however, is not maintainable for a tenement(*x*), because it includes incorporeal hereditaments, such as advowsons, and is, therefore, deemed bad for uncertainty, nor for a messuage(*y*) or tenement, because the word "tenement" is more extensive in its signification than the word "messuage," nor for a messuage(*z*) and tenement; but after a general verdict in an ejectment for a messuage and tenement, the Court(*a*) allowed the lessor of the plaintiff, pending a motion in arrest of judgement, to enter the verdict, pursuant to the judge's notes, for the messuage only, and even after judgement in ejectment for a messuage and tenement, it was ruled(*b*) upon a writ of error, that if the same count in a declaration contain two demands or complaints, for one of which the action lies, and not for the other, the damages shall be referred to the good cause of action, though it would be otherwise if they were in separate counts, and the judgement was affirmed. But an ejectment for a messuage or tenement, followed by a specific description(*c*), is sufficient, as a messuage or tenement called the Black Swan: an ejectment does not lie for a close(*d*) or piece(*e*) of land, though, with the addition of the name(*f*) of the close or piece of land, or other words descriptive of their situation, it will be supported.

Many questions were formerly raised upon writs of error from Ireland, before the English Court of Queen's Bench, respecting the sufficiency of the description of lands: ejectments for 500 acres(*g*) of bog, and fifty acres of mountain(*h*), and for 10,000 acres in the

(*u*) *Wright v. Wheatley*, Cro. Eliz. 14.

(*v*) *Hill v. Giles*, Cro. Eliz. 818; *Hamond v. Ireland*, Styles, 215.

(*w*) *Fitzgerald v. Marshall*, 1 Mod. 1.

(*x*) *Goodtitle v. Walton*, 2 Stra. 834; *Barnard*, 155, S. C.; *Copleston v. Pinder*, 1 Ld. Raym. 191.

(*y*) *Goodright dem. Welch v. Flood*, Wils. 23; *Hexham v. Coniers*, 3 Mod. 28; *Burbury v. Yeomans*, 1 Sid. 295.

(*z*) *Doe dem. Bradshaw v. Plowman*, East, 441, overruling *Doe dem. Stewart v. Denton*, 1 T. R. 11.

(*a*) *Goodtitle dem. Wright v. Otway*, 1 East, 357.

(*b*) *Doe dem. Lawrie v. Dyeball*, 8 B. & Cren. 70; 1 Moo. & P. 330; *Dyeball v.*

Doe dem. Lawrie, 2 M. & Ry. 184, S. C.; and see *Ashworth v. Stanley*, Style, 364.

(*c*) *Massy v. Rice*, 1 Cowp. 346; *Burbury v. Yeomans*, 1 Sid. 295; *Hexham v. Coniers*, 3 Mod. 238; *Goodtitle v. Walton*, Barnard. 155.

(*d*) *Savel's case*, 11 Co. 55; *Hammond v. Savill*, 1 Ro. Rep. 55, S. C.; *Knight v. Syms*, 1 Salk. 254; 1 Shower, 315, S. C.

(*e*) *Palmer's case*, Owen, 18; *Palmer v. Humfrey*, Moor, 422-702.

(*f*) *Wykes v. Sparrow*, Cro. Jac. 435; and see *Hancocke v. Price*, Hardr. 57.

(*g*) *Mac Donnogh v. Stafford*, 2 Ro. Rep. 166-189; *Palm*, 100; *Mulcarry v. Eyres*, Cro. Car. 512.

(*h*) *Ld. Kildare v. Fisher*, 1 Stra.

quarter(i) of land of Tullagh, with the *town and tenement* and fairs and markets thereunto belonging, in the count common, and all those the lands and hereditaments of Gr a large deer park, and the parsonage of Longford in the san and for twenty towns(*j*) and lands, and for a plough-land(*k*) fifty acres of furze(*l*) and heath, and fifty acres of moor a without specifying the quantity in each, were held suffi the judgements affirmed.

In an ejectment brought for certain specified premises, a or other proportion of the property may be recovered, accord title established by the lessor of the plaintiff: so an ejectme an undivided(*n*) moiety, or other undivided share of lands, a not be stated in the declaration, whether the share claimed or undivided: in an ejectment for 100 acres of land, in al those one moiety or full half(*o*) of the lands of Cavin, it was the ejectment being brought for a certain number of acres, “moiety” must be construed to mean a divided moiety, and ciently certain.

Tithes, though an incorporeal hereditament, may be re ejectment by the provisions of the Irish Statute(*p*), 33 Hen. V 1, c. 12, but the particular species of tithe ought to be speci the declaration: so an ejectment lies for a rectory consisting glebe-lands, and tithes: a parson having been simoniacally instituted, and inducted to a benefice, and another person, o sentation of the Crown, being instituted(*r*) and inducted, i cided that the presentee of the Crown might maintain eje the rectory against the parson so simoniacally presented, be church was vacant by reason of the simony, though if the ch full, *quare impedit* would have been the proper remedy.

This action will not lie for an advowson, a rent, or c

71; *Ld. Kingston v. Babington*, 1 Bro. Parl. Ca. 71.

(*i*) *Cottingham v. King*, 1 Burr. 623.

(*j*) *Jane v. Pollexphen*, 2 Keb. 745;

(*k*) *Massy v. Rice*, 1 Cowp. 346.

(*l*) *Connor v. West*, 5 Burr. 2672.

(*m*) *Doe dem. Bryant v. Wippell*, 1 Espin. N. P. C. 360.

(*n*) *Rawson v. Maynard*, Cro. Eliz. 286; *Denn dem. Burges v. Purvis*, 1 Burr. 326; *Rowe in Error v. Power*, 2 New Rep. 1.

(*o*) *Loveland dem. Coyne v. Bartley*,

Alc. & Nap. 306.

(*p*) 33 Hen. VIII. Sess.

4, Irish; 32 Hen. VIII. c. 7

Baldwin v. Wine, Cro. Ca

Jones, 321; *Camell v. Clav*

Raym. 789; *Dean and Chap*

sor v. Gover, 2 Saund. 304,

(*q*) *Harpur's case*, 11 Co

Ro. Rep. 68, S. C.

(*r*) *Doe dem. Watson v.*

B. & Cress. 25; 2 Mann.

S. C.

gross, or for a stream of water, though it may be supported for recovery of specified lands with the common thereto(s) appurtenant, and after verdict, an ejectment brought for lands and also for common of pasture(t) was held sufficient, for when liberties and privileges are appurtenant to land for which an ejectment is brought, the former may be recovered(u) with the land, because all incorporeal things included in the demise are recoverable in ejectment, though an ejectment will not lie for the incorporeal things alone, and, therefore, a demise in ejectment of the lands of Blackacre, with the appurtenances, is sufficient for the recovery of easements belonging to the land: if a water-course is sought to be recovered, it must be described(v) as so much land covered with water, and the claimant must establish his title to the soil. An ejectment lies by the owner of the soil for land which is subject(w) to a right of passage over it, as the king's highway, because trees growing along the high-road, and mines under it, belong to the proprietor of the land, and he may convey water-pipes under it, and may recover any part of the land improperly encroached upon, or enclosed. This action may be brought for the recovery of a coal mine(x), but cannot be supported by a mere license(y) to dig and search for minerals.

An ejectment does not lie for property in possession or the Crown, or of officers of the Crown(z), the remedy in such cases being by petition of right addressed to the sovereign.

17. In describing the locality of premises in a declaration in ejectment, it is only necessary to name the county in which they are situated. Where the premises sought to be recovered were(a) described as "ten acres of land, with the appurtenances, situate in the county of Somerset," upon motion in arrest of judgement, it was decided that the statement of their situation in a particular county was sufficient, without any other local description: however, the more usual and the better practice is to specify the denomination(b) of land, or other known name

(s) *Baker v. Roe*, Cases temp. Hardw. 127; *Barton v. Hamshire*, 3 Keb. 738.

(t) *Newman v. Holdmyfast*, 1 Stra. 54.

(u) *Crocker v. Fothergill*, 2 B. & Ald. 652-661, by Holroyd, J.

(v) *Challoner v. Thomas*, Yelv. 143.

(w) *Goodtitle dem. Chester v. Alker*, 1 Burr. 133.

(x) *Comyn v. Kyneto*, Cro. Car. 150; *Comyn v. Wheatley*, Noy, 121; *Whittingham v. Andrews*, 1 Salk. 255; *Carth. 277*; 4 Mod. 143, S. C.

(y) *Doe dem. Hanley v. Wood*, 2 B. & Ald. 724; *Chetham v. Williamson*, 4 East, 469-476; *Crocker v. Fothergill*, 2 B. & Ald. 661.

(z) *Warden and Commonalty of Saddlers' case*, 4 Rep. 54, B.; *Doe dem. Legh v. Roe*, 8 Mees. & W. 579; 3 Blackst. Comm. 254.

(a) *Doe dem. Edwards v. Gunning*, 7 Ad. & Ell. 243; 2 Nev. & P. 260, S.C.

(b) *Doe dem. Rogers v. Bath*, 2 Nev. & M. 441.

of the place, along with the county, for the purpose of identifying the premises with their description contained in any lease, or title deed, intended to be produced on the trial; but it is prudent to omit not only the parish and barony(c), but the abuttals, and the names of former owners commonly inserted in leases. Any ambiguity in the description of premises(d) in an ejectment, is cured by taking defence, because the defendant must admit himself to be in possession of the land for which he takes defence, and if the proofs of title made on the trial do not vary from, or are not inconsistent with the description of the parcels in the declaration, the claimant will be entitled to recover. Where a general defence is taken to an ejectment, evidence is not admissible to shew that the premises sought to be recovered do not form part(e) of the denomination of land described in the declaration, but that they constitute parcel of a different townland. Upon a statement in an ejectment that one M. S. at Haswell, in the county of B, demised to the nominal plaintiff two messuages, and after verdict(f) for the plaintiff, it was moved in arrest of judgement, that no place was named, in which the demised premises were situated, but as it was alleged that the defendant at Haswell aforesaid, ejected the plaintiff from the lands, the Court held it a sufficient averment that the lands claimed lay in the vill of Haswell. The declaration having alleged that one Rogers, at the parish of Davidstowe, in the county of Cornwall, demised to the nominal plaintiff (g) certain lands (without stating where they were situated), upon motion in arrest of judgement, the declaration was held insufficient to support the verdict, but the Court allowed it to be amended on payment of costs. If premises are described as being in a particular parish(h), or barony, and such description is neither warranted by the fact, nor by the statement of the lease, the variance will be fatal, but the judge at *Nisi Prius*, in the exercise of his discretion, will correct(i) the record. So in an ejectment to recover possession of certain houses, which were described to be in the parish of St. Margaret and St. John, it appeared(j) they were two separate parishes,

(c) Goodtitle *dem.* Bremridge *v.* Walter, 4 Taunt. 671; Goodtitle *dem.* Pinsent *v.* Lammiman, 2 Campb. N. P. C. 274; 6 Espin. N. P. C. 128, S. C.

(d) Lessee Tyrrell *v.* Quinlan, Alc. & Nap. 135; Doe *dem.* James *v.* Harris, 5 M. & Selw. 326.

(e) Murphy *dem.* Roberts *v.* Furlong, 2 Huds. & Br. 548; Doe *dem.* Boys *v.* Carter, 1 Younge & Jerv. 492.

(f) Goodright *dem.* Smallwood *v.*

Strother, 2 W. Bla. 706.

(g) Doe *dem.* Rogers *v.* Bath, 2 Nev. & M. 440; 7 Adol. & Ell. 246, note.

(h) Goodtitle *dem.* Pinsent *v.* Lammiman, 2 Campb. N. P. C. 274; 6 Espin. N. P. C. 128, S. C.

(i) Doe *dem.* Marriott *v.* Edwards, 1 Moo. & Rob. 318; Doe *dem.* O'Connell *v.* Porch, Adams, 227.

(j) Doe *dem.* Marriott *v.* Edwards, 1 Moo. & Rob. 318; Goodright *dem.*

some of the houses were in the parish of St. Margaret, and the parish of St. John : Justice James Parke held, though an error that the premises were situate in the *parishes* of St. Margaret and St. John would have been sufficient, yet only one parish being stated, and by a name which did not belong to any parish, the variance was fatal ; but as the party could not have been misled by the error, he allowed^(k) the error to be corrected. However, lands described as situate in the parish of West Putworth and Bradbury appeared in evidence^(l) that part of the premises were in the parish of West Putworth, and another part in the adjoining parish of Clontarf, and the statement was held sufficient : a parish is sufficient if described in an ejectment, if stated according to the name^(m) which it is generally known, and in pursuance of the liberal construction of ejectment proceedings, it is probable that the misdescription of parish or barony would be deemed immaterial, and rejected as a technical objection, or that an amendment would be permitted unless the variance was calculated to mislead.

A description of premises in an ejectment, which is in fact correct, though not warranted by the lease, will be supported. A declaration which incorrectly described certain premises as being situated in the parish of Clontarf, it appeared in evidence they were incorrectly⁽ⁿ⁾ described by the lease as being in the parish of Clonturk, and upon a declaration made on account of the misdescription, the Court observed that the declaration need not accurately follow the statement of the premises in the lease, provided the locality of the premises were truly described in the declaration, and that the evidence established their action was in the parish of Clontarf. If the specification of the premises in an ejectment be sufficiently extensive to comprise the whole of the premises, it will not be objectionable for covering too great a quantity of lands, as where an ejectment was brought for certain lands, as formerly occupied by one Malone, and the lease appeared to have been made of the premises formerly occupied by Malone except a house and garden, the variance was deemed imma-

Fawson, 7 Mod. 457 ; 2 S. C. ; Murphy v. Conolly, Rep. 116.

1 Geo. IV. c. 53, s. 58, Irish title *dem.* Bremridge v. Walcott, 671 ; Doe *dem.* Tollet v. East, 9 ; Doe *dem.* James v. L. & Selw. 326 ; Lessee Tyrrell v. Alc. & Nap. 135.

(*m*) Doe *dem.* Boys v. Carter, 1 Y. & Jerv. 492 ; Kirtland v. Pounsett, 1 Taunt. 570.

(*n*) Lessee Ball v. Baker, 1 Law Rec. 188.

(*o*) Lessee Keiley v. Ahearne, Batty, 18, note ; Lessee Bradshaw v. Cranley, Batty, 324, in the note.

terial. An ejectment for nonpayment of rent must comprise every parate denomination of land(*p*) specified in the lease, because it cannot be a partial eviction for nonpayment of rent, and if a mistake occur, by omitting one of the parcels, an amendment of the record not be permitted, or, if allowed, will be unavailing.

(*p*) Lessee Allen *v.* Smith, 1 Jones, 279.

CHAPTER IV.

PROCEDURE IN EJECTMENT.

<i>appear annexed to</i>	<i>absconds.</i>
<i>be served.</i>	25. <i>Service of Ejectment for Nonpayment of Rent.</i>
<i>the limiting Number of</i>	26. <i>Where Service of Ejectment is resisted.</i>
<i>be allowed in Costs.</i>	27. <i>Service where Interpreter is employed.</i>
<i>or Service is to be ef-</i>	28. <i>Affidavit of Service.</i>
<i>fectory Service held suffi-</i>	29. <i>Amendment of Ejectments on the Title.</i>
<i>cient resides out of the</i>	30. <i>— of Ejectments for Nonpayment of Rent.</i>
<i>county.</i>	
<i>be effected where Tenant</i>	

ICE is always annexed to the declaration in ejectment, party served to retain an attorney to appear for him in any term to defend his title, if any he have, to the present the casual ejector will suffer judgement to pass against him, and then the party served will be turned out of possession; notice should be subscribed with the name of the casual ejector where it happened to be signed in the name of the nominator. If the Court refused to set aside the proceedings; and the notice be signed by the lessor of the plaintiff, or with the name, or if the declaration be served in vacation and the parties served to appear in a wrong(c) term, or omit any term, judgement may, notwithstanding the mistake, be given against the casual ejector. However, a notice advising the party to appear and defend(e) *in due time*, or omitting the declaration, that the tenant would be turned out of possession, is insufficient, for the notice would be useless if it omitted the period of appearance or the consequences of neglect, and the courts are now very liberal in permitting the amendment of erroneous notices. It is the ordinary practice in Ireland to

and *dem.* Price v. That-
51.

dem. Duke of Norfolk v.
Ald. 849.

Graves, 2 Chitty, 172;

the v. Roe, 4 Taunt. 738;

5 v. Roe, 5 Dowl. Pr. C.

(d) Doe v. Roe, 1 Cro. & Jerv.
330.

(e) Doe *dem.* Isherwood v. Roe, 2
Nev. & Mann. 476; Doe *dem.* Forbes v.
Roe, 2 Dowl. Pr. C. 420.

(f) Doe *dem.* Darwent v. Roe, 3
Dowl. Pr. C. 336.

(g) Doe *dem.* Darwent v. Roe, 3

direct the notice "To all persons concerned," and not to any tenant by name, and to require them to appear in the next term generally, whether the venue be laid in Dublin or not. It was observed by Mr. Baron Bayley, that the strict form of a declaration in ejectment^(h) might be dispensed with, provided sufficient information was contained in the notice.

In ejectments for nonpayment of rent it is required by the Irish⁽ⁱ⁾ Statute, 8 Geo. I. c. 2, that upon service of the summons in ejectment, notice in writing should be given to the person served with such summons, that the ejectment was brought on account of the nonpayment of rent. This notice is always printed at the foot of the notice to appear, and is in the following form: "You are likewise desired to take notice that the above ejectment is brought on account of the nonpayment of rent, pursuant to the Statutes in that case made and provided."

19. The declaration, or summons in ejectment, being the commencement of the suit, is regarded *as process* for the purpose of giving notice to the persons interested in the lands to defend their possession, and should be served upon the tenant in possession, or, if the possession be divided between several tenants or under-tenants, upon the several^(j) occupiers separately, and upon every other person having or claiming any estate in the premises, although^(k) not in possession; and every person should be told at the time of service, that the instrument delivered to him is an ejectment, and unless he employed an attorney to take defence to it in the next term, he would be turned out of possession.

In Ireland the affidavit of service always^(l) concludes by stating "that the deponent knows the lands, and that he does not know of any person who has or claims, or pretends to have or claim any right, title, or interest in or to the same, or any part thereof, except the persons served therewith, the plaintiff and his lessors, and those under whom they derive." By the English Statute^(m), 11 Geo. II. c. 19, s. 12, it is *enacted*, that every tenant to whom a declaration in ejectment shall be delivered, shall give notice thereof to his landlord, under

Dowl. Pr. C. 336; Doe *dem.* Bass *v.* Roe, 7 T. R. 469.

(h) Doe *dem.* Bloxham *v.* Roe, 6 Dowl. Pr. C. 389; Doe *dem.* Evans *v.* Roe, 5 Dowl. Pr. C. 508.

(i) 8 Geo. I. c. 2, ss. 1 and 7, Irish.

(j) Doe *dem.* Ld. Darlington *v.* Cock, 4 B. & Cress. 259; but see Roe *v.* Wiggs,

2 New Rep. 330.

(k) Savage *v.* Dent, 2 Stra. 1064; Boardman *v.* Greer, 2 Fox & Sm. 55; 2 How. Law Exch. 37 and 39.

(l) See the note to Boardman *v.* Greer, 2 Fox & Sm. 55.

(m) 11 Geo. II. c. 19, s. 12, English.

penalty of forfeiting the value of three years improved, or rack-rent(*n*) of the demised premises, to be recovered by action of debt. There is no similar enactment in any Irish Statute, and it is not improbable that the form of affidavit adopted in Ireland was introduced for the purpose of giving notoriety to the service of ejectments, which would prevent any collusive or fraudulent concealment of the proceeding from persons interested in defending the possession. If any person in possession or in receipt of the rents(*o*) and profits of any part of the premises for an unexpired term, at the time of serving the ejectment, is turned out of possession under a writ of *habere*, without having been served, he(*p*) will be reinstated by writ of restitution on an application for that purpose; but a tenant by sufferance, or a mere servant or occupier without title, if evicted, will not be restored.

20. The form of the affidavit of service in Ireland afforded a pretext, in many cases, for serving a great number of copies of ejectments on unnecessary persons, who were supposed, by an ignorant process-server, to have some interest or claim in the premises, and, in order to guard against such expenses, by the Irish Statute(*q*) 4 Geo. IV. c. 89, it is enacted, that it shall not be lawful for any attorney or solicitor in Ireland to recover against his client, or for any party to recover against the other party, in any suit depending between them in any court of law or equity, or in the revenue side of the Court of Exchequer, any sum of money, fee, reward, or emolument for making or serving any copy of any declaration and summons *in ejectment*, or any order, writ, process, or proceeding, filed in, or made by, or issued out of any of the said courts, over and above *two hundred* copies, save and except such sum as shall be actually and necessarily paid and expended for and in, and about the printing and serving such additional copies.

The abuse which this Statute was intended to correct, consisted chiefly in the service of ejectments founded upon writs of *elegit*, and the service of summonses upon writs of *scire facias* against heir and terre-tenants, and upon orders in *custodiam* cases, but the Statute extends to all ejectments, and limits the number of copies, for the service of which an attorney is allowed to charge, either his client, or the adverse party.

21. Any tenant of the premises sought to be recovered may be

(*n*) Crocker v. Fothergill, 2 B. & Ald. 652.

(*o*) Lessee Green v. Ejector, 2 Law Ec. 133.

(*p*) Lessee Wynne v. Swift, 2 Irish Law Rep. 159.

(*q*) 4 Geo. IV. c. 89, s. 1, Irish.

served *personally* with the declaration in ejectment, either upon the lands, or at any other place, but as it frequently happened, that the immediate tenant, as well as many persons holding derivative interests, did not reside on the premises, and great difficulties were experienced in such cases, it was enacted, by the Irish Statute(*r*) 1 Geo. IV. c. 41, that whenever it shall happen, that the tenant of any lands or tenements in Ireland shall *not be resident* in such lands or tenements, the delivery of any notice or process to such tenant in person, or at the dwelling-house of such tenant to his wife, or to any child or servant of such tenant, being of the age of sixteen years or upwards, shall, in all cases, be deemed good and sufficient service of any such notice or process, although such tenant shall not be resident, or his dwelling-house shall not be situate on the lands or tenements demised to such tenant, or to which such notice or process shall relate. Although the first section of this Statute is confined to proceedings by civil bill, the second section has always been considered to extend to service of ejectments out of the superior courts.

By the provisions of this Act, the delivery of the declaration or summons in ejectment personally to the wife of the tenant at his dwelling-house, is made sufficient service on her husband, and, in like manner, delivery of the declaration or summons(*s*) to any child or servant of the tenant of the age of *sixteen years*, at his dwelling-house, wherever it may be situated, is rendered good service on the tenant. The affidavit of service usually states that the intent and meaning of the declaration, summons and notice was explained to such wife, child, or servant, as the case may be, and that they were desired to give the copies served upon them to the husband, father, or master: if it is stated by affidavit that the notice annexed to the declaration was read over(*t*) to the tenant or his wife, or that the tenant read it(*u*) and said he understood its meaning, the service will be deemed valid without any explanation, or if the process-server be prevented(*v*) from explaining the contents: however, the omission to state in the affidavit of service, any explanation of the summons or notice having been given, is not considered material, because the Statute(*w*) declares the mere ser-

(*r*) 1 Geo. IV. c. 41, s. 2, Irish.

(*s*) Smith & B. 468, App.

(*t*) Doe v. Roe, 2 Dowl. Pr. C. 199; and see Doe *dem.* Downes v. Roe, 4 Dowl. Pr. C. 565.

(*u*) Doe *dem.* Jones v. Roe, 1 Dowl.

Pr. C. 518.

(*v*) Doe *dem.* George v. Roe, 3 Dowl. Pr. C. 541; Doe *dem.* Neale v. Ejector, 2 Wilson, 263.

(*w*) 1 Geo. IV. c. 41, s. 2, Irish.

n all cases, be deemed good and sufficient, and the notice declarations in ejectment for nonpayment of rent, pursuant to the Statute(*x*), supersedes the necessity of any verbal(*y*) explanation.

the Statute(*z*), 1 Geo. IV. c. 41, a copy of the declaration to be personally delivered(*a*) upon the premises to the tenant's servant, or lodger, aged upwards of sixteen years, and living in the parish, was deemed good service, provided its meaning were explained at the time of effecting the service: the Statute was passed for the purpose of removing doubts as to the validity of the service of a writ where the tenant did not reside on the lands, and is considered declaratory and not as introducing any new rule, and, therefore, if service would have been deemed effectual prior to this Statute, it is still recognized as valid, so that the decisions in England that affidavits of service are received in Ireland as authorities, and are not inconsistent with the provisions of the Irish Statute, are correct.

Where service is effected on the tenant personally, or on his wife, or servant, pursuant to the Statute, are termed regular services, and if any peculiarity occurs in the mode of service, or the provisions of the Statute cannot be strictly complied with, if the Court, on application, will be satisfied from the affidavit of service, that the ejectment was delivered(*b*) to the tenant's hands before the commencement of the writ, and that the claimant has done every thing in his power to accomplish the service, such service will be established(*c*) and declared valid.

Where a copy of the ejectment is delivered to the tenant's wife(*d*) on the premises at her husband's dwelling-house(*e*) wherever situated, it is effectual, but service on the wife *elsewhere*(*f*) cannot be supported unless the affidavit state she was living with her husband at the time, or will an affidavit, stating service of a woman on the premises, and that she represented herself to be the tenant's wife, be sufficient, or will a process-server depose(*g*) that he believes the representation

I. c. 2, ss. 1, 7, Irish.
Alcock v. Doyle, Smith & Co. 10 App.

IV. c. 41, s. 2, Irish.
Law Exch. 38; 2 Fer-
59.

Agar v. Roe, 6 Dowl.

dem. Ld. Derby v. Ejector,
105, 505; 1 Irish Law Rep.

Badtitle v. Badtitle, 1 Chitty's

Rep. 499, in the note.

(e) Doe dem. Wingfield v. Roe, 1
Dowl. Pr. C. 693; Doe dem. Baddam
v. Roe, 2 Bos. & Pull. 55; Doe dem.
Morland v. Bayliss, 6 T. R. 765.

(f) Doe dem. Briggs v. Roe, 2 Cro.
& Jerv. 202; 1 Dowl. P. C. 312; Doe
dem. Williams v. Roe, 2 Dowl. Pr. C.
89; Jenny dem. Preston v. Cutts, 1 N.
R. 308.

(g) Doe dem. Simmons v. Roe, 1 Chit-
ty's Rep. 228; Doe dem. Walker v. Roe,

to be true, nor will an affidavit of service on Mrs. Smith(*h*), stating her to be either the wife or the mother of the tenant in possession, be received. Where several persons hold the same premises jointly or in partnership, service(*i*) of any partner or joint-tenant upon the premises personally, will be good service upon his companions, provided their joint interest appear by affidavit, but secondary service effected upon one of them by delivery of the declaration to his wife, child, or servant(*k*), will not bind the other co-tenants. Where two sisters(*l*) reside together in the same house, personal service of an ejectment on one of them, and giving her a copy for her sister, will be sufficient, and personal service on the premises, upon the daughter of a bed-ridden tenant(*m*), who stated she had given the copy to her mother, is valid.

Service of a master is not good service upon his servant(*n*), though residing in the house, unless the master place himself in the position of an agent; nor will service of a tenant's clerk off the premises be deemed sufficient(*o*); but service of a lodger, by leaving a copy of the ejectment with the keeper(*p*) of the house, has been deemed sufficient to warrant a conditional order.

If a house be used only for public purposes, such as an almshouse(*q*), or chapel(*r*), service may be effected on the chapel-wardens, or upon the persons intrusted with the keys of the building. Upon an ejectment for premises in possession of the Manchester Railway Company(*s*), service on their book-keeper, on part of the premises which he occupied, and where he slept, was deemed valid; and in like manner, service on the secretary(*t*) of the East India Company, in respect of premises sought to be recovered from the Company, was held sufficient, where it appeared that the secretary was the proper person to receive process on behalf of the company. Where a prisoner confined in the Marshalsea is to be served, the deputy marshal, on application

4 Moo. & P. 11; Doe *dem.* Bremner *v.* Roe, 8 Dowl. Pr. Ca. 134; Doe *dem.* Grange *v.* Roe, 1 Dowl. Pra. Ca. 274, N. S.

(*h*) Doe *dem.* Smith *v.* Roe, 1 Dowl. Pr. Ca. 614; Doe *dem.* Mitchell *v.* Roe, 1 H. & Woll. 646.

(*i*) Doe *dem.* Gaskell *v.* Roe, 3 Tyrw. 84; Doe *dem.* Williamson *v.* Roe, 10 Moo. 493; Doe *dem.* Overton *v.* Roe, 9 Dowl. Pr. Ca. 1039; Doe *dem.* Bromley *v.* Roe, 1 Chitty's Rep. 141.

(*k*) Doe *v.* Godlin, Woodf. 762.

(*l*) Doe *dem.* Grimes *v.* Roe, 4 Dowl. Pr. Ca. 86; Anon. 2 Law Rec. 238.

(*m*) Doe *dem.* Frost *v.* Roe, 8 Dowl.

Pr. Ca. 301.

(*n*) Lessee Maquay *v.* Ejector, 4 Law Rec. 158, 2nd Ser.

(*o*) Lessee O'Neale *v.* Ejector, 2 Law Rec. 122, 2nd Ser.

(*p*) Doe *dem.* Threader *v.* Roe, 1 Dowl. Pr. Ca. 261, N. S.

(*q*) Tupper *dem.* Mercer *v.* Doe, Barnes, 181.

(*r*) Doe *dem.* Scott *v.* Roe, 6 Scott, 732; Doe *dem.* Smythe *v.* Roe, 1 Dowl. Pr. Ca. 509.

(*s*) Doe *v.* Roe, 1 Dowl. Pr. Ca. 23; Doe *dem.* Martyns *v.* Roe, 6 Scott, 610.

(*t*) Doe *dem.* Coopers' Company *v.* Roe, 8 Dowl. Pr. 134.

ose(*u*), will accompany the process-server to enable him to eject.

small houses were demised to one person, who usually unto weekly tenants: one of the houses being unoccupied(*v*), that service of an ejectment for nonpayment of rent on and the occupiers of five of the houses, should be deemed was observed by Patteson, J., that if the lessee allow the remain unoccupied, he may himself be treated as tenant in

of an ejectment on the administratrix of the last tenant in is insufficient, unless she is herself tenant in possession, presumption(*w*) of law is, that real property belongs to the be shewn that the last tenant had only a chattel interest ises, and if, in fact, the interest were only chattel, the affi- describe the administratrix (not in her representative cha- as tenant in possession, though she was not in the actual of the premises. On the decease of an immediate tenant the expiration of a lease for years, or of a notice to quit, if f administration(*x*) have been granted, and the servant of the continue in possession, the landlord should try to obtain and if resisted by the servant, he may then be treated as and service of the ejectment on him will be deemed suf-

enant be a lunatic, the declaration should be served on the of his person, and of his estate, and if no committee(*y*) has ited, upon the person having the care of the lunatic and ment of his property, and the Court, on motion for that ll order that such service shall be valid, upon serving such e person having the lunatic under his care.

n immediate lessee reside out of the jurisdiction and cannot with an ejectment, and the lands are in the occupation of ts, it is unnecessary to obtain any order declaring that the he occupiers(*z*) shall be deemed good against the absent les-

t *dem.* Chatterton *v.* Eject-
t S. 387; Lessee Beale *v.*
w Rec. 55, 2nd Ser.

m. Hayne *v.* Roe, Willm.
72; Doe *dem.* Hindle *v.*
& W. 279, 6 Dowl. Pr.

m. Rigby *v.* Roe, 4 Dowl.
y Coleridge, J.

m. Atkins *v.* Roe, 2 Chit-

ty's Rep. 179; Doe *dem.* James *v.* Staun-
ton, 1 Chitty's Rep. 118; Gulliver *dem.*
Clarke *v.* Swift, 2 Ld. Kenyon, 511;
Doe *dem.* Cuff *v.* Stradling, 2 Stark. N.
P. C. 187.

(*y*) Doe *pem.* Lord Aylesbury *v.* Roe,
2 Chitty's Rep. 183; Doe *dem.* Wright
v. Roe, Barnes, 190.

(*z*) Boardman *v.* Greer, 2 Fox & Sm.
54.

see, as an affidavit stating that every person known to have title ~~was~~ served, except such tenant residing out of the jurisdiction, will be unobjectionable: but in an ejectment brought to defeat a subsisting lease for nonpayment of rent, if a party having title cannot be served personally, it becomes necessary to adopt some other mode of service, which the Court may consider sufficient. When the immediate tenant resides abroad, and carries(*a*) on his business by an agent living on the concern, or if the demised premises are left under(*b*) the care, or subject to the control of another, or if the absent tenant receive rents out of the property by means(*c*) of a land-agent, delivery of a copy of the ejectment to such agent, or manager, and posting another copy, will be deemed sufficient, but the agency must be distinctly sworn to. So where the tenant has gone to America(*d*) without any intention of returning, or has been(*e*) transported, posting a copy of the ejectment and serving the occupier entitles the claimant to a conditional order.

It has generally been considered that personal(*f*) service of an ejectment upon a party resident out of the jurisdiction, entitles the lessor of the plaintiff to enter judgement against the casual ejector, but doubts have lately been suggested, whether such service on persons living abroad, especially of ejectments for nonpayment of rent, can be deemed valid: in cases of this kind, the affidavits of service do not disclose where the service was effected, and this mode of proceeding has been uniformly pursued, though the subject has been seldom brought under consideration of the courts; the practice, however, has been approved of by the Queen's Bench, but has not received(*g*) the sanction of the Common Pleas. Where the occupier refuses to disclose his name, but says he is tenant, and his name(*h*) cannot be discovered after diligent inquiry, an affidavit of service on such person, stating the facts, will be admitted.

24. If a tenant abscond or keep out of the way, to avoid being

(*a*) *Doe v. Roe*, 4 B. & Ald. 653; *Anon.* 3 Law Rec. 253, 1st Ser.; *Doe dem. Treat v. Rowe*, 4 Dowl. Pr. Ca. 278; *Doe dem. Potter v. Roe*, 1 Hodges, 316; *Doe dem. Nottige v. Roe*, 4 Mann. & Gr. 28.

(*b*) *Doe dem. Robinson v. Roe*, 3 Dowl. Pr. Ca. 11; *Loveland dem. Colclough v. Thrustout*, 1 Huds. & Br. 44; *Doe dem. Bourne v. Ejector*, 3 Irish Law Rep. 363; *Doe dem. Dickens v. Roe*, 7 Dowl. Pr. Ca. 121.

(*c*) *Lessee Beere v. Ejector*, Glasc. Rep. 133; *Jack dem. Hornidge v. Thrustout*, Smythe, 263; *Lessee Dopping*

v. Ejector, 6 Law Rec. 390.

(*d*) *Doe dem. Osbaldiston v. Roe*, 1 Dowl. Pr. Ca. 456; *Doe dem. Tibel v. Roe*, 7 Jurist. 725.

(*e*) *Anon.* 3 Law Rec. 30, 1st Ser.

(*f*) *Anon.* 1 Law Rec. 320, 1st Ser.; *Jack dem. Gilston v. Howard*, 2 Fox & Sm. 127; *Doe dem. Daniel v. Woodroffe*, 7 Dowl. Pra. Ca. 494.

(*g*) *Lessee Ld. Bessborough v. Ejector*, 3 Irish Law Rec. 159, 1st Ser.; *Doe dem. Stewart v. Ejector*, 3 Irish Law Rep. 20.

(*h*) *Doe dem. Fitzwygram v. Roe*, 2 Dowl. Pr. Ca. 672, N. S.

cannot be discovered, a copy of the ejectment should be delivered to any person residing on, or occupying the premises, and if the premises should be unoccupied, a copy of the ejectment(*i*) should be posted on the outer door of the house, or upon some conspicuous part of the premises, and the affidavit should state the measures pursued for the purpose of effecting regular service, so as to satisfy the Court that due diligence had been used, and that the tenant secretes himself and cannot be served, or that he has absconded and keeps out of the way to avoid service, or from some other motive, and that he has no agent or person in charge or management(*j*) of his property, on whom process could be served, and that the premises are unoccupied and deserted, and that the summons in ejectment was duly posted, when the Court, in the exercise of their discretion, will grant a conditional order for judgment, and direct how it shall be served. A tenant having absconded, his niece, who was(*k*) the sole manager of his house and business, and it, had been personally served, and a copy of the declaration and summons had been posted, on an affidavit of the facts, a conditional order for judgment was granted.

In a case where the premises consisted of a barn, in which the tenant had been sleeping, there being no dwelling-house on the land, an affidavit stating that the tenant was not to be found at his last place of abode, and that the premises(*l*) were unoccupied, and that a copy of the summons had been posted on the barn-door, was held sufficient to entitle the plaintiff to a conditional order. A tenant in possession keeping the premises in such a way, no access to her could be obtained(*m*) except by reference to her attorney, who directed that the ejectment should be sent to his client at her last place of abode, which was done, and the ejectment was delivered to a person who was supposed to have been left by her in possession, and also to the attorney, the Court granted a conditional order.

In cases of ejectment for nonpayment of rent, the Irish Statute, 3 Geo. III. c. 27(*n*), after reciting, that tenants before the expi-

dem. Lovell v. Roe, 1 Chit. 15, and note; Doe *dem.* Tarran v. Roe, 1 Chitty's Rep. 506; Doe v. Roe, 2 Chitty, 177; Doe v. Roe, 6 Bing. N. C. 207; Green v. Ejector, 2 Fox & S. 17. Morpeth v. Roe, 3 Dowl. 17.

dem. Dovaston v. Roe, 4 Cr. 765.

Rightly *dem.* Collins v. Dunch,

2 Burr. 1116.

(*l*) Fenn *dem.* Buckle v. Roe, 1 New Rep. 293.

(*m*) Anon. 2 Chitty's Rep. 179; Anon. 2 Chitty, 187; 2 D. & Ry. 5.

(*n*) 15 & 16 Geo. III. c. 27, s. 4, Irish; 4 Geo. II. c. 28, s. 2, English, which extends to all cases of ejectment for non-payment of rent, where the declaration "cannot be legally served, or no tenant is in actual possession."

ration of their leases, being in arrear to their landlords or lessors, frequently abscond, and leave the demised premises *waste and untenanted* so that no declaration, summons, or notice in ejectment, can be served for the recovery of the demised premises, till an application is made and an order obtained from one of the courts of common law, for substituting some other mode of service thereof, whereby great delay is often occasioned to such landlords or lessors, and the arrear of rent due to them becomes consequently greatly increased, before they can evict such leases, enacts, that in all cases where the tenant or tenants of any demised premises shall *abscond and cannot be found*, upon affixing a copy of the declaration, summons, and notice in ejectment for nonpayment of rent, upon some conspicuous part of the principal house in and upon the demised premises, and if there be no house thereon, upon some other public and conspicuous place upon the demised premises: and in cases of ejectment for nonpayment of rent reserved upon leases of tithes, or other ecclesiastical dues, upon the church-door of the parish, or union of parishes, wherein such tithes, or ecclesiastical dues are payable: and if there be no church in such parish or union of parishes, upon some other public and conspicuous part of such parish or union of parishes: the same shall be a sufficient service of such summons and notice in ejectment, without any rule or order of any court for that purpose previously had or obtained: provided that before such service of the summons and notice shall be allowed by the Court, in which such ejectment shall be brought, as sufficient service, it shall be made appear to such Court by affidavit, that the tenant or tenants of such demised premises, or tithes, or ecclesiastical dues, hath or have *absconded*, and though diligent search hath been made for him or them, he or they cannot be found(*o*); and provided also(*p*), that such summons or notice shall have been so affixed one month before any further proceedings shall be had in such ejectment.

If an ejectment for nonpayment of rent be regularly served upon certain tenants of demised premises, and be posted pursuant(*q*) to the preceding Act, against an absconding tenant, the landlord may proceed against the persons duly served, without waiting for the expiration of the month allowed by the Statute for the benefit of the absconding tenant. The provisions of the Statute must be strictly observed(*r*), upon ejectments for nonpayment of rent against absconding tenants,

(*o*) Section 5.

(*p*) 15 & 16 Geo. III. c. 27, s. 6, Ir.

(*q*) Long *dem.* Darcy *v.* Thrustout, 1 Huds. & Br. 99.

(*r*) Lessee Hayden *v.* Ejector, Smith & B. 60; Lessee Smyth *v.* Ejector, Batty, 456.

the directions be pursued, it will not be necessary to obtain leave of the Court to enter up judgement against the casual ejector: but if the tenant reside abroad, and has not absconded, the case does not fall within the Statute, and upon a sufficient affidavit(s), the Court may order that posting a copy of the ejectment on a conspicuous part of the premises, and effecting such secondary service as circumstances may require, shall be deemed good service.

The heir at law of a deceased tenant having gone to America, where an ejectment for nonpayment of rent was substituted on the mother, who acted as his agent(t) in managing the property, made payments to the landlord on account of the rent, but the Court will not substitute such service upon an unknown(u) heir of a tenant. Where the Court are required to substitute service in an ejectment brought for nonpayment of rent due by a person having a lease, who has absconded or gone abroad, the affidavit must not only state service on the occupiers, and posting the ejectment on a conspicuous part of the premises, but must shew(v) the nature of the estate which the absent tenant has in the lands, and that after inquiries from persons likely to be acquainted with the facts, it appeared that the absent tenant had neither property nor agent in the country.

A tenant in possession having mortgaged his interest in demised premises, and refusing to give any information respecting the mortgage, where he was to be found, an order(w) was made for substituted service of an ejectment for nonpayment of rent on the mortgagee, by posting a copy upon a conspicuous part of the premises, and leaving the tenant in possession. The occupying tenants, and the mortgagee in the habit of receiving the rents payable by them, having been served with an ejectment for nonpayment of rent, it was ordered that service on the person in receipt of the rents should be deemed good service of the person having the legal estate in the demised premises.

See *Ld. Clifden v. Ejector*, 1 B. 61; *Doe dem. Crofton v. Ejector*, 2 Fox & Sm. 51; *Doe dem. v. Ejector*, 3 Irish Law Rep. 101; *Waller v. Ejector*, Crawf. & F. Notes, 155. *Lreland dem. Colclough v. Ejector*, 1 B. & Br. 44. *Clark dem. Lord Blessington v. Ejector*, 1 Huds. & Br. 42. *Large dem. Ld. Darnley v. Thrustons*, 1 B. & Br. 408; *Lessee Coates*

v. Ejector, 4 Law Rec. 179, 1st series; *Lessee Bateson v. Ejector*, 4 Law Rec. 188; *Lessee Boylan v. Ejector*, 3 Law Rec. 132, 2nd series; *Loveland v. Steers*, 2 Law Rec. 123, 2nd series; *Lessee — v. Ejector*, 2 Jones, 306.

(w) *Lessee Hemming v. Ejector*, 2 Law Rec. 69, 2nd series.

(x) *Lessee Hime v. Ejector*, 6 Law Rec. 209; *Lessee Becher v. Ejector*, 6 Law Rec. 210.

mises, who could not be discovered. Where the immediate tenant resided abroad, service of an ejectment for nonpayment of rent by the wife's servant, at her dwelling-house(y), was held insufficient, and it did not appear that the tenant and his wife had not been separated.

26. If the service of an ejectment be resisted, or if the process-server(z), either by threats or violence, be intimidated, or prevented from effecting the service, a copy of the declaration be left at any house on the premises, or put through a window, or posted on the outer door of a dwelling-house on the premises, according to circumstances, and the Court will, upon an affidavit of the process-server, order that such service shall be deemed effectual, or will allow of some other mode of service. Service of an ejectment effected by leaving a copy of the ejectment under the door(b) of the dwelling-house when the tenant was in the house and refused to open the door to listen to the explanation, attempted to be given, of the object of the service, was deemed sufficient: and where a process-server, informed that the tenant, who was keeping out of the way, had not come home, put up a ladder to the drawing-room window, and believed the tenant to be in the room, explained the nature of the process at the window, and posted a copy on the outer door: a copy of the rule for judgement was granted, which was directed to be served in the same way as the process.

Where violence or threats are not resorted to, the affidavit must state that the tenant or his wife were in the house(d) at the time of the attempted service, or should shew some reasonable ground for such a belief; and although the outer door be kept shut, a mode of service by posting the ejectment be deemed sufficient will be granted, if a single(e) effort only be made to serve the process where the outer door is closed against the process-server and attempts are unsuccessfully made to effect personal service of

(y) *Lessee — v. Ejector*, 1 Law Rec. 58, 2nd series.

(z) *Doe dem. Carey v. Ejector*, 2 Fox & Sm. 120; *Lessee Ld. Lorton v. Ejector*, Stew. Exch. Pr. 155; *Halsal dem. Ld. Leigh v. Wedgwood*, Barnes, 174; *Doe dem. Wills v. Roe*, 3 Dowl. Pra. Ca. 582; *Lessee St. George v. Ejector*, 4 Irish Law Rep. 133.

(a) *Doe dem. Dry v. Roe*, Barnes, 178; *Farmer dem. Miles v. Thrustout*, Barnes, 180.

(b) *Doe dem. Lowndes v. Roe*, 7 Mees. & W. 439; *Doe dem. Commis-*

sioners of Education v. M'Lellan, Fox & Sm. 60; *Doe dem. Ld. Roe*, 3 Dowl. Pr. Ca. 552; *Livian v. Ejector*, 1 Law Rec. series; *Lessee Guion v. Ejector*, Rec. 321, 1st series; *Doe dem. Thorpe v. Roe*, 2 Dowl. Pr. Ca.

(c) *Doe dem. Colson v. Roe*, Pr. Ca. 765.

(d) *Doe dem. Frost v. Roe*, Pr. Ca. 314; *Loveland v. K*, Law Rec. 122, 2nd series.

(e) *Lessee — v. Ejector*, Rec. 36, 2nd series.

onpayment of rent, and reasonable grounds are assigned for the tenant was in the house, an order(*f*) will be made, that the ejectment on the hall-door, and serving the gate-keeper by shall be sufficient: if service of an ejectment be prevented by fraud(*g*) or contrivance of the tenant, a conditional order will be granted. Where the premises were used as a house, and access to the persons in occupation was rendered for any person attempting to serve process, an affidavit vice on the individual whom the process-server(*h*) *believed* to be in possession, was held sufficient to warrant a conditional order which was directed to be served on the persons at the door, or by copy.

If the tenant be unable to speak(*i*) English, the process-server may employ an interpreter to explain the nature and object of the process, and it is not requisite that the interpreter should be sworn, in the affidavit of service, provided the process-server depose to the person employed interpreting, as he believed, the exact meaning of the process.

Service of an ejectment on Sunday(*j*) will be set aside for error, being considered in the nature of process.

The affidavit of service must be entitled in the names(*k*) of the lessors of the plaintiff in the ejectment, but it need not(*l*) take notice of the demises are joint, nor which of them are several, nor the peculiar(*m*) character or description of a lessor of the premises. The affidavit must be positive, without the introduction of qualifying expressions: an affidavit stating service on two tenants jointly(*n*) *as administrators*, was considered insufficient: the name of the tenant should be specified, or an excuse for the failure must be stated, by shewing that reasonable diligence had been successfully used for its discovery: an affidavit stating the delivery of a declaration to the tenant's wife on the premises, instead of

p Martin *v.* Ejector, 1 Law series.

em. Frith *v.* Roe, 3 Dowl. ; Doe *dem.* Turnecroft *v.* & Woll. 371.

m. George *v.* Roe, 3 Dowl.

m. Probert *v.* Roe, 3 Dowl.

oomfield *v.* Ejector, 1 Law st series; Goodtitle *dem.* Notitle, 2 D. & Ry. 232; . 764, S. C.; Doe *v.* Roe, 1892.

(*h*) Doe *dem.* Cousins *v.* Roe, 4 Mees. & W. 68; 7 Dowl. Pr. Ca. 53; Doe *dem.* Watson *v.* Roe, 5 Dowl. Pr. Ca. 389; Doe *dem.* Walters *v.* Roe, 1 Wilm. W. & Dav. 75.

(*l*) Doe *dem.* Barles *v.* Roe, 5 Dowl. Pr. Ca. 447.

(*m*) Doe *dem.* Jenks *v.* Roe, 2 Dowl. Pr. Ca. 55.

(*n*) Doe *v.* Roe, 2 Tyrw. 158; 2 Cro. & Jerv. 45; 1 Dowl. Pr. Ca. 295, S. C.; Birkbeck *v.* Hughes, Barnes, 173.

(*o*) Doe *dem.* Warne *v.* Roe, 2 Dowl. Pr. Ca. 517.

following the common form(*p*) by stating service of the declaration on the tenant, by delivery of the copy to his wife, was held sufficient: party served with the ejectment cannot take advantage of any defect in the affidavit until after judgement(*q*) marked, because the lessor or the plaintiff may not intend to avail himself of the affidavit against the person applying. Upon a motion to set aside the rules for pleading, in an ejectment for nonpayment of rent, grounded on an affidavit stating that the demise(*r*) in the copy of the ejectment served, was laid on the 2nd of May, 1807, and that the demise in the ejectment filed was on the 2nd of May, 1827, the Court ruled that the affidavit of the process-server stating the service of a true copy, could not be controverted in such a manner.

A compared copy of the affidavit of service of an ejectment for nonpayment of rent, purporting to have been sworn before one John Conry, as a commissioner for taking affidavits(*s*), having been produced in evidence on the trial of the cause, it was ruled by the King's Bench that the defendant could not set up by way of defence, or be permitted to prove, that there was no commissioner for taking affidavits bearing the name subscribed to the copy of the affidavit produced. So upon the trial of an ejectment for nonpayment of rent, though the compared copy of the affidavit of service which was given in evidence only shewed that the original affidavit had been sworn(*t*) before a Master extraordinary for taking affidavits in the Court of Chancery, yet the person who took the affidavit having proved that he was also a commissioner of the Court of Exchequer, authorized to take affidavits, upon a point saved, the Exchequer held that the evidence was sufficient.

29. It was formerly considered that a declaration(*u*) in ejectment could not be amended before defence had been taken, and that it could only be amended, after defence, in matter of form. The superior courts, however, at present exercise great latitude of discretion in moulding all requisite forms in the procedure so as to promote an effectual trial of the merits between the parties. An amendment will now be permitted where any mistake arises from confusion of names or of dates, or where an error occurs from inaccuracy in the general

(*p*) *Doe dem. Jenkins v. Roe*, 5 Dowl. Pr. Ca. 155.

(*q*) *Lessee Gabbett v. Ejector*, Alc. & Nap. 184.

(*r*) *Long dem. Ld. Enniskillen v. Thrustout*, 1 Huds. & Br. 359.

(*s*) *Lessee Fry v. King*, Smith & B.

86; and see *Thoroughgood v. Goold*, 2 Fox & Sm. 106; *Shepherd v. Fitzhenry*, 1 Huds. & Br. 105.

(*t*) *Lessee Bradshaw v. Cranley*, Batty, 325, in the note.

(*u*) *Smith & Batty's Rep.* 486, in the Appendix.

on of the premises, by the use of the word “tenement” or prohibited expression. Amendments are permitted to be made on the title, after defence taken, by changing(*v*) the day of the demise to a period after the lessor’s title had accrued, and even of forfeiture, where the demise was(*w*) laid by mistake prior to the date of committing the alleged forfeiture; or by inserting the description(*x*) of demised premises, when omitted in the declaration by introducing a new demise, when founded on the same facts as the first in the name(*y*) of a trustee or of a mortgagee, or of a person appointed by the Court of Chancery; and where some tenants have been served with a copy of the declaration entitled in the name(*z*) of a named lessee, an amendment is allowed by filing the second declaration in the name of the nominal plaintiff which ought to have been served, or where the second declaration was filed of the tenth(*a*) of the eleventh year of the reign.

After the ejectment has been moved on, and before defence taken, amendments have been allowed by altering the day of the demise(*b*), by adding additional(*c*) demises, by adding the name of the attorney making the description(*e*) of the premises conformable to the declaration, and by correcting a mistake(*f*) or omission in the notice to the declaration: but the day of the demise cannot be altered by substituting a day subsequent to the service of the declaration, because such an amendment would give the lessor of the plaintiff(*g*) of action which did not exist when his suit was commenced.

An amendment by striking out the word “tenements” in the description(*h*) of the premises, or by enlarging(*i*) the term of the

See Incorporated Society *v.* *Hardy* & B. 463; *Doe dem.* *Hardy* & B. 463; *Doe dem.* *Hardy* & B. 463; *Doe dem.* *Hardy* & B. 463; *Doe dem.* *Hardy* & B. 463.

dem. *Rumford v. Miller*, 1 *Rep.* 536, in the note.

dem. *Rogers v. Bath*, 2 *Nev.* 227; *Doe dem.* *O’Connell v. Adams*, 227.

dem. *Beaumont v. Armitage*, 3 *Rep.* 302; 1 *Dow. & Ry.* 302; *Lessee Ridge v. Ejector*, 3 *Rep.* 302; *Lessee Lightbody v. Lightbody*, 5 *Irish Law Rep.* 482.

See *Frankfort v. Willett*, *Cr. Notes*, 78.

See *Ld. Clifden v. Willett*, 3 *Rep.* 252, 1st series.

See *Carroll v. Ejector*, 1 *Irish Law Rep.* 117.

dem. *Bacon v. Bridges*, 8

Jurist, 363.

(*d*) *Doe dem.* *Conroy v. Roe*, 3 *Law Rep.* 315, 1st series.

(*e*) *Jack dem.* *O’Brien v. Ejector*, 2 *Jebb & S.* 397; 2 *Irish Law Rep.* 329, *S. C.*

(*f*) *Doe dem.* *Darwent v. Roe*, 3 *Dowl. Pr. Ca.* 336; *Doe dem.* *Bass v. Roe*, 7 *T. R.* 469; *Doe dem.* *Folkes v. Roe*, 2 *Dowl. Pr. Ca.* 567.

(*g*) *Doe dem.* *Foxlow v. Jeffries*, *Adams*, 227.

(*h*) *Doe dem.* *Lawrie v. Dyeball*, 8 *B. & Cr.* 70; 1 *Moo. & P.* 330; *Adams*, 26, in the note.

(*i*) *Vicars v. Haydon*, *Lessee Carroll*, 2 *Cowp.* 841; *Peaceable dem.* *Uncle v. Watson*, 4 *Taunt.* 16; *Lessee Ld. Ormond v. Blundell*, *Glasc.* 48; *Roe dem.* *Lee v. Ellis*, 2 *W. Bla.* 940.

demise, will be allowed even after error brought; but the term will not be enlarged after(*j*) great lapse of time, unless it be clearly shewn that no injustice can be done by such permission.

A declaration in ejectment having been served, accompanied, by mistake, with the usual notice annexed, that it was brought for nonpayment of rent, the Exchequer, after defence taken, refused to suffer an(*k*) amendment to be made by striking out this notice, because an ejectment for nonpayment of rent treats the defendant as tenant, while in an ejectment on the title he is treated as a trespasser, and the alteration would have the effect of changing the nature and end of the action: but where a party who was served with an ejectment for nonpayment of rent takes defence to an ejectment on the title, he cannot, after verdict, object to the nature(*l*) of the process served on him, for if a proper summons in ejectment were not served, he should have applied in due time to set aside the proceedings for irregularity.

30. In ejectments for nonpayment of rent there is much greater difficulty in allowing amendments(*m*) to be made, because the service of the ejectment, which is substituted for demand and re-entry at common law, must be proved on the trial by producing an attested copy of the affidavit of service, from which it would appear that the amended ejectment varied from the ejectment which was served. This objection, however, seems rather technical, and attributes more importance to the doctrine of variance than it has lately obtained. Amendments have been allowed by the Queen's Bench in ejectments for nonpayment of rent, by altering(*n*) the dates of the several demises, entries, and ousters, from January, 1825, to July, 1826: and where one of the demises in the record varied from the corresponding demise in the declaration served, it was ruled(*o*) that such variance was only an irregularity of which no advantage could be taken on the trial: so after issue joined in an ejectment for nonpayment of rent, where it appeared that one of the lessors of the plaintiff had no interest in the demised premises, and was a necessary(*p*) witness for the other lessors

(*j*) Doe *dem.* Reynell *v.* Tuckett, 2 B. & Ald. 773; 1 Chitty's Rep. 535; Bradney *v.* Hasselden, in error, 1 B. & Cr. 121; 2 D. & Ry. 227.

(*k*) Lessee Blennerhasset *v.* Leary, Hayes, 378; Lessee *Ld.* Headley *v.* Lane, Glasc. 158, S. C.

(*l*) Lessee Fanning *v.* Gleeson, Hayes & J. 432.

(*m*) Anon. 4 Law Rec. 201, 1st ser.

(*n*) Lessee Hendley *v.* Segrave, Smith

& B. 487; Lessee Reade *v.* Greene, Sm. & B. 487; Lessee Barton *v.* Ejector, Cr. & Dix, Abr. Notes, 452; and see Lessee Lewin *v.* Jennings, 4 Irish Law Rep. 418, in the Common Pleas.

(*o*) Lessee Harris *v.* Prendergast, 2 Fox & Sm. 345; and see the note, 2 Fox & S. 355.

(*p*) Lessee Russel *v.* Tuthill, 2 Irish Law Rep. 360.

ff on the trial, leave was given by the Queen's Bench to declaration, defence, and other proceedings, by striking ie of such superfluous lessor of the plaintiff, wherever it security being given to the defendants for any costs they ver in the cause: an amendment was also allowed by uer(*q*), for the purpose of making the description of the the ejectment conformable to the description contained in

claration in ejectment for nonpayment of rent omit one of ations of land comprised in the lease, an amendment will ved for the purpose of inserting(*r*) such denomination, as t be a partial eviction of the lease, and the ejectment served for recovery of parcel, no title can be shewn for the whole interest under the lease, but it is not essential ctment shall accurately follow the description of the pre- ted in(*s*) the lease, if it be sufficiently comprehensive to whole subject of the demise. After defence taken to an brought in the Exchequer for nonpayment of rent, and, the second declaration, the lessor of the plaintiff obtained court to amend by striking out the words "parish of St. l by altering the statement of the local description of the other respects, and upon a point saved at the trial, the between the declaration served and the declaration(*t*) as as held to be fatal, and a nonsuit was ordered to be entered; also declared that no alteration should for the future be the second declaration, except to correct mistakes, so as to nformable to the declaration served.

he trial of an ejectment for a forfeiture, an amendment was be made in the record by altering the name(*u*) of the parish ie premises sought to be recovered were alleged to be situ- where the demise was laid on the 15th of January, in an brought in respect of a right of re-entry for nonpayment appeared that the right did not accrue until the 16th of and the judge at Nisi Prius amended the record accord-

: Kelly *v.* Byrne, 5 Law series.

: Allen *v.* Smith, 1 Jones's 279.

: Marmions *v.* Emerson, 1 20.

Mayne *v.* Thynne, Exch. MSS.; same case, by the

name of Lessee Russell *v.* Thynne, 6 Law Rec. 269, 2nd series; and see Henderson *v.* Dickson, 1 Irish Circ. Rep. 55.

(*u*) Doe *dem.* Marriott *v.* Edwards, 1 Moo. & Rob. 318; 6 Carr. & P. 208.

ingly ; and the Court held that the judge(*v*) had authority to amend the amendment, and that the declaration, when amended, was considered as having always been in its amended form ; and the defendant was bound by the consent rule to confess *any* lease which would establish the title of the lessor of the plaintiff.

(*v*) Doe *dem.* Edwards *v.* Leach, 3 509, S. C.
Mann. & Gr. 229 ; 3 Scott's New R.

CHAPTER V.

PROCEDURE IN EJECTMENT.

- | | |
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| <p>the Ejectment.
Defence.
be entered.
take Defence.
utary Affidavit of Service.
tion of Defences.
s imposed on taking De-

or the Purpose of raising
n of Part and Parcel.
fining Defence to Lands
ndant's Possession.
by Joint-Tenant, or by
in common.
r Judgement by Tenant,
essor's Prejudice.
eclaration.
t as in Case of a Nonsuit.</p> | <p>known, or not concurring.
45. <i>Where Lessor of the Plaintiff re-
sides out of the Jurisdiction, or
is an Infant.</i>
46. <i>Where Security for Costs required
from Defendant.</i>
47. <i>Proceedings stayed until Costs of
prior Ejectment paid.</i>
48. <i>Stat. 1 Geo. IV. c. 87, by which
Defendant may be required to
give Security.</i>
49. <i>Construction of the Act.</i>
50. <i>Demand of Possession required.</i>
51. <i>Affidavit requisite to ground Ap-
plication.</i>
52. <i>What Cause held sufficient against
making Order absolute.</i>
53. <i>After Receiver appointed, Leave
must be obtained to serve, or to
prosecute Ejectment.</i></p> |
|--|---|
- NG PROCEEDINGS.
the Plaintiff, either un-

ffidavit of due service(a) of the ejectment must be filed in
t ensuing such service, along with the original ejectment
which duplicates or copies were served, and a transcript of
n in ejectment, omitting, however, the notice to appear,
parchment, being lodged in the proper office, a rule is
he plaintiff's declaration be received as of the preceding
t six days be allowed to appear and plead. The entering
technically termed "*moving on the ejectment*," and the
allows for taking defence consists of six *sitting* days in
e rule be entered at so late a period as not to admit of six
efore the end of the term, the number must be completed
ng term: after the first rule has run out, a second rule,
lgement, is entered, unless appearance and plea in four
ond rule must be entered in the term, but the four days,
days are not reckoned, may run out in vacation, and after
ted by the rule for judgement has elapsed, judgement may
gainst the casual ejector: neither of these rules require to
there is no defendant in Court but the casual ejector.

reporter's note as to the nexed to the case of *Lessee Wall v.*
ctice in ejectments, an- Ejector, *Hayes*, 275.

When regular service of an ejectment cannot be effected, and a satisfactory affidavit is produced, shewing that reasonable diligence was used to accomplish the object, an order may be obtained, directing that the service already had shall be deemed good service on the person, either not served, or defectively served, and adding such further terms as the circumstances of the case render expedient: by this mode of proceeding, a party is at liberty to move on his ejectment(*b*), and enter the usual rules on the original affidavit, but cannot mark judgement against the casual ejector, unless it is shewn that all the terms imposed by the Court have been complied with.

32. Defence cannot regularly be taken until after the lessor of the plaintiff has moved on the ejectment, and no costs can be recovered in the cause until after defence has been duly entered: any person served with the ejectment may appear by his attorney, and take defence for all, or for any specific part of the lands and premises sought to be recovered. In the Exchequer, defence is entered(*c*) in the following form: "John Jack, lessee of, &c., against the casual ejector. I appear, and take defence in the name of Arthur Smith, *either* for all the lands and premises [*or* for twenty acres of the lands of Lismote, being part of the lands and premises, *or* for that part of the lands and premises in the possession of the said Arthur Smith], in the plaintiff's declaration in ejectment in this cause mentioned, as usual. Dated, &c., and subscribed William Rastall, attorney for Arthur Smith:" at the same time, a plea of not guilty entitled in the name of the defendant Arthur Smith, at the suit of John Jack, is filed, and notice must then be given by the defendant's attorney of his having taken defence.

The mere technical form of the defence is not much regarded, and the omission(*d*) to insert in its title the names of the lessors of the plaintiff, or a misstatement(*e*) of one of the demises, or putting the name of the real defendant in place of the casual ejector, does not even amount to irregularity; but the defence must apply to the premises(*f*) comprised in the ejectment, and should state distinctly that it is taken for the whole, or for some particular part of the premises, and should be confined(*g*) to the part of the lands in which the defendant is interested or in possession. As any person served with an ejectment has

(*b*) *Crow dem. Lord Derby v. Ejector*, 1 Jebb & S. 505.

(*c*) 1 Stewart's Forms in the Exchequer.

(*d*) *Doe dem. Spencer v. Reid*, 3 Moore, 96.

(*e*) *Lad dem. Fitzpatrick v. Thrust-*

out, 1 Huds. & Br. 208; *Lessee Gillespie v. M'Carthy*, Cr. & Dix, 1

(*f*) *Lessee London Irish Society v. Ejector*, 4 Law Rec. 86.

(*g*) *Lessee O'Hara v. Griffin*, 1 Law Rec. 93, 2nd Ser.; *Lessee Nicholson v. Ejector*, Cr. & Dix, Abr. Notes, 418.

a right to take defence, it is prudent to avoid serving(*h*) unnecessary persons, who are neither in possession of, nor in receipt of rent issuing out of the premises.

33. Defence may be taken in the Queen's Bench at any time(*i*) before judgement is marked against the casual ejector, but the Exchequer(*j*) will not receive a defence in country causes after the latest day for giving notice of trial at the next ensuing assizes has elapsed. Whether defence be taken for the whole, or for a part of the premises, it is prudent to proceed in the cause against the casual ejector, for the purpose of entitling(*k*) the plaintiff to obtain judgement for any part of the lands not covered by the defence, or with a view of binding persons who were served, and who neglect to appear in due time, so as to preclude them from taking defence afterwards.

34. Defence entered in the name of a person who was not served with the ejectment, unless leave(*l*) of the Court be obtained for that purpose, may be treated as a nullity(*m*), and such permission will only be granted to a person who was in possession or in receipt of the rents at the time of bringing the ejectment, and upon an application for liberty to take defence, the Exchequer require(*n*) an affidavit stating both title and possession in the applicant: if, however, any apprehension be entertained of judgement being marked before an application can be made for liberty to defend, it may(*o*) be prudent to enter a defence, and immediately serve notice of motion, that it should be allowed to stand.

35. Where an ejectment has been duly served, and delay occurs in procuring an affidavit of service on any of the persons interested, or if the affidavit on which the rule to plead is entered states any of the services inaccurately, or omits the name of a person who was duly served, the defect may be remedied by filing(*p*) a supplementary affidavit at any time before trial in the Queen's Bench, or before the four last days of term in the Exchequer, without defeating the rules to plead.

(*h*) Lessee M'Kee v. M'Kee, 1 Law Rec. 421.

(*i*) Lessee Tighe v. Ejector, 2 Law Rec. 126, 2nd Ser.; Jack dem. Thompson v. Andrews, 1 Jebb & S. 547.

(*j*) Lessee Stephenson v. Crean, 3 Law Rec. 355.

(*k*) See the Exchequer Rule, 30th June, 1680; 2 How. Law Exch. 56.

(*l*) Lessee Green v. Ejector, 2 Law Rec. 133; Jack dem. M'Spadden v. Thrustout, 1 Huds. & Br. 353; Doe v. Roe, Smythe, 91; Lessee Lodge v.

Ejector, 3 Law Rec. 115, 2nd Ser.; Smith & B. 479.

(*m*) Lessee Wall v. Ejector, Hayes, 274; Lessee Barlow v. Connell, Batty, 63.

(*n*) Hayes & J. 664.

(*o*) Lessee Wall v. Ejector, Hayes, 276, reporter's note.

(*p*) Jones dem. Colthurst v. Haynes, 2 Fox & Sm. 357; Jenny dem. Preston v. Cutts, 1 New Rep. 308; 2 How. Law Exch. 40.

An ejectment was brought in the King's Bench for nonpayment of the rent of Blackacre, and a separate ejectment for nonpayment of the rent of Whiteacre, both situate in the same county, and held under distinct leases, on the demise of the same lessor of the plaintiff, and in the name of the same feigned lessee: the ejectment for Blackacre having been taken down for trial, it was discovered that the writ of service of the ejectment for Whiteacre had been annexed to the writ of service of the ejectment for Blackacre, and was so filed by mistake, and that the ejectment for Blackacre had been regularly served, no affidavit of service had been filed: upon the discovery of this error during the trial, an affidavit of the service of the ejectment for Blackacre was sworn and filed, and was proved on the trial in the usual manner by the production of an attested and compared copy: an objection was made that there was no affidavit to warrant the proceedings, and at that point saved, it was decided that proof of the affidavit of service was only substituted for the testimony of a witness to prove the fact of service, and that the affidavit for such purpose might be made at any time before the trial.

36. If parties served with an ejectment take separate defence, a consent rule will be made for consolidation(*r*), on the terms that the defendants shall be at liberty to make separate defences on the merits of the plaintiff's undertaking, in case the defendant in any one cause be acquitted, to pay such defendant his costs, although such costs should pass against the other defendants, and without prejudice to any right which either of the defendants(*s*) may be entitled to, at the discretion of the judge on the trial, to be examined as a witness against the others.

37. No consent rule is ever entered into by a party taking defence to an ejectment for lands in Ireland, but all the conditions implied by the consent rule in England, are implied in the permission to take defence which is adopted in Ireland: a defendant who takes a general defence, must confess any lease that will establish the title of the lessor of the plaintiff, an entry by the plaintiff in ejectment.

(*q*) Jones *dem.* Colthurst *v.* Haynes, 2 Fox & Sm. 357, MSS.; Lessee Fry *v.* King, Smith & B. 87, by Burton, J.

(*r*) Jack *dem.* M'Cormick *v.* M'Allister, 2 Fox & Sm. 268, and the note; Jones *dem.* Ryan *v.* Bolton, 1 Huds. & Br. 424; 1 Law Rec. 54, 1st Ser. S. C.; Adams 264.

(*s*) Lessee *Ld.* Egremont *v.* Sharpe, 2 Law Rec. 128, 2nd Series; Lessee Smith *v.* Grey, 1 Jebb & S. 684 Lessee

Gregory *v.* Archer, 1 Irish L. 97; Lessee Boyle *v.* Ejector Law Rep. 220.

(*t*) Doe *dem.* Barton *v.* Quin & Br. 40.

(*u*) Murphy *dem.* Roberts *v.* 2 Huds. & Br. 548; and see the general Rule on the subject in England & Ald. 196; Doe *dem.* Ed Leach, 3 M. & Gr. 229.

on, and an ouster by himself from, the premises stated in the declaration, *as described therein*, and the defendant is not at liberty to convert that he was in possession of those premises at the time(v) of the issue of the ejectment, so that a mere misdescription cannot be relied on as an objection to the plaintiff's right to recover.

38. An ejectment is said to raise a question of "part and parcel," when the identity of the premises sought to be recovered forms the subject of dispute, and if the boundary line be controverted, or the declaration do not describe(w) the lands with sufficient accuracy, the practice observed in the Queen's Bench requires that the party should set out in his defence the particular part of the premises which he claims, and then obtain an order requiring the lessor of the plaintiff to sue for the specific part of the lands in defendant's possession; but the lessor of the plaintiff will not be obliged to describe specifically(x) in his declaration the premises which he seeks to recover. According to the practice of the Exchequer(y), where lands are claimed as being part and parcel of Whiteacre, and the person taking defence claims the premises as part and parcel of Blackacre, the ejectment should be brought for the lands of Whiteacre, and defence should be entered for the lands of Blackacre, in possession of the defendant, called by the declaration the lands of Whiteacre, being the premises [or parcel of premises] in the declaration mentioned: a party taking defence(z) in that manner, if he thinks it necessary the declaration should be amended more precise, may apply to the Court for that purpose, but if he has made himself a party to the suit by taking defence, he has no right to make the application: the plaintiff has a right to call the land by whatever name he thinks fit, and the defendant can only take defence for the lands mentioned in the ejectment.

If a general defence be taken, and a right be established to recover part(a) of the premises comprised in the ejectment, the lessor of the plaintiff is entitled to a general verdict, with the costs of the cause, and no question of boundary can be tried between the parties, as the generality of the description of premises in an ejectment precludes any inquiry as to the precise quantity which the lessor of the plaintiff has a right to recover. In an ejectment for recovery of possession of lands comprised in an expired lease, defence was taken for that part of the

(v) Jones *dem.* M'Donnell *v.* Grady, 2 L. & Br. 537.

(w) Lessee Elliott *v.* Ejector, Alc. & S. 142; Lessee London Irish Society *v.* Ejector, 4 Law Rec. 86.

(x) Jack *dem.* Corbet *v.* Ejector, 1 L. & S. 671.

(y) 2 How. Law Exch. Pr. 80.

(z) Lessee Ld. Listowell *v.* Ejector, Jones & Carey, 172; 1 Irish Law Rep. 313, S. C.

(a) Doe *dem.* Drapers' Company *v.* Wilson, 2 Stark. N. P. C. 477.

lands in the declaration mentioned, upon which a store then stood; the lessors of the plaintiff, on the trial, established their title to all the lands included in the expired lease, and after giving(*b*) in evidence a compared copy of the defence, it was insisted that the defendants were precluded by the form of their defence(*c*) from denying that the disputed premises formed part of the lands specified in the ejectment, but the learned judge being of a different opinion, a verdict was found for the defendants, and upon a motion for a new trial, the Exchequer held that by the general form of defence, it was admitted that the premises comprised in the defence formed part of the lands described in the ejectment, and upon that ground, amongst others, set aside the verdict, giving liberty to the defendants to amend their defence, and to the lessors of the plaintiff to amend their declaration.

39. If an ejectment on the title be brought for a farm, and occupying tenants holding separate parcels(*d*) take defence for the whole, an order may be obtained, even after notice of trial, that they shall confine their defences to the parts of the lands in their possession respectively; but where the occupier of part of a dwelling-house(*e*) took defence for the entire, the Court refused to restrict the defence to the part in the defendant's possession, in consequence of the inconvenience which might arise from the nature of the holding. A defence taken for parcel of the premises in an ejectment for nonpayment of rent will be set aside, because the Ejectment Acts require(*f*) that the rent in arrear shall be ascertained by verdict, in case of defence, and by affidavit if no defence entered, and do not make any provision in case of a partial defence, where the rent would have to be ascertained partly by affidavit, and partly by verdict, and, therefore, do not admit of a partial eviction: but where an ejectment for nonpayment of rent is served upon a person in the occupation of premises comprised under the description in the declaration, which are not held under the lessor of the plaintiff, a defence will be allowed for such parts of the premises as are alleged to be in the defendant's possession(*g*), upon the terms that the only question to be raised on the trial shall be, whether

(*b*) *Troy dem. Corporation of Lime-
rick v. Carroll.*

(*c*) See *Doe dem. Greaves v. Raby*, 2 B. & Adol. 948.

(*d*) *Lessee O'Hara v. Griffin*, 1 Law Rec. 93, 2nd Ser.; *Lessee M'Kee v. M'Kee*, 1 Law Rec. 422, 1st Ser.

(*e*) *Lessee Browne v. Mason*, Cr. & Dix, Abr. Notes, 167; 1 Jebb & S. 31.

(*f*) *Lessee Coote v. Grady*, 1 Jones's

Exch. Rep. 131; 3 Law Rec. 124, 2nd Ser.; *Lessee Barrington v. Wolfe*, 5 Irish Law Rep. 426; and see *Lessee Horsfall v. Jennings*, 4 Irish Law Rep. 218.

(*g*) *Kerr dem. Keown v. Thrustout, Smythe*, 478; *Lessee Longfield v. Ejector*, 4 Law Rec. 84, 2nd Ser.; *Longfield on Ejectment*, 166; and see *Lessee Nicholson v. Ejector*, Crawf. & D. 418.

f the plaintiff, or any of them, are landlords of such dis-
within the meaning of the Ejectment Acts: if such per-
not granted, a person who never held under the lessors of
night, by means of a general description of premises in an
e deprived of his possession.

1 ejectment by a joint-tenant, or tenant in common, against
n, in order to avoid the implied(*h*) admission of ouster,
ecessary to obtain leave of the Court, on an affidavit de-
ouster, to enter into a special consent(*i*) rule merely con-
and entry, and not ouster, unless actual ouster shall be
he trial: the affidavit for the purpose must shew that the
ng is interested in the question, and if he be only an under-
e of the parties, a sufficient reason(*j*) must be assigned
dlord did not take defence and make the application.
ken in the name of a wrong person by mistake(*k*), was
e amended, after judgement against the casual ejector
affidavit of merits being required.

landlord defray the expenses of defending an ejectment in
his tenant, who is prevailed upon to give a consent for
he Court will set aside(*l*) any judgement entered on such
the landlord will be allowed to take defence in his own
ich permission will be granted, although(*m*) the occupy-
ave betrayed the possession to the lessor of the plaintiff.
ken contrary to good faith will be set aside, but where a
tered(*n*), without fraud or deceit, it will not be set aside,
plaintiff's attorney omitted proceeding to trial, through
on an offer made by the defendant's attorney to withdraw
and give up possession.

r defence taken, and before the record is made up for trial,
laration must be engrossed on parchment and filed(*o*),
the name of the real defendant for the name of the casual
entitling the second declaration of the term in which de-
ken, instead of the term mentioned in the original declara-

m. Wigfall *v.* Brydon, 3

. Gigner *v.* Roe, 2 Taunt.
rwin *v.* Ejector, 3 Law
Ser.; Adams, 263.

1. Wills *v.* Roe, 4 Dowl.

3arlow *v.* Connell, Batty,

(*l*) Doe *dem.* Locke *v.* Franklin, 7
Taunt.9; 1 Chitty's Rep. 390, in the note.

(*m*) Doe *dem.* Draycott *v.* Dyos, 5
Tyrw. 735; 2 Cro. M. & Rosc. 60; 3
Dowl. Pr. Ca. 696, S. C.

(*n*) Lessee Drought *v.* Murphy, 5
Irish Law Rep. 113.

(*o*) Lessee O'Herlihy *v.* M'Carthy,
Smith & B. 74.

tion, and where the defence is only for part of the lands mentioned in the ejectment, the second declaration is made to correspond with such partial defence: if separate defences are taken, and no rule is made for consolidation, a second declaration(*p*) must be filed against each person defending separately, corresponding with his defence, and separate records must be issued for trial in each case: the second declaration is a mere matter of form, and is seldom filed until the party is preparing to have the *Nisi Prius* record made up for trial.

43. In the Queen's Bench, issue is considered to be joined in this action by taking defence(*q*), and notice of trial may, therefore, be delivered before filing the second declaration, and if no proceedings be taken in the cause(*r*) for three terms after defence, the defendant may obtain leave(*s*) to file a second declaration in the plaintiff's name, and to enter up judgement as in case of a nonsuit: but where no proceeding is taken in the cause, for more than a year after issue joined, the defendant will not be permitted to file a second declaration for the purpose of entering up judgement as in case of a nonsuit, without entering a rule for liberty to proceed(*t*), and giving a term's notice. According to the settled practice of the Exchequer, issue is not considered as joined for the purpose of applying for judgement as in case of a nonsuit, until the second declaration is filed(*u*); and three terms must have elapsed after such period without proceeding to trial, before the rule can be obtained.

44. If the lessor of the plaintiff be unknown to the defendant, the plaintiff's attorney should be required to furnish a specification of his client's residence(*v*) or place of abode, and if the application be not complied with, or a fictitious account be given, the proceedings will be stayed until security for costs shall be found, but the poverty of the lessor of the plaintiff does not afford any ground for demanding such security; and where the lessor of the plaintiff was alleged to be out of her mind, and it was reasonably believed that the ejectment was brought without her sanction(*w*) or concurrence, proceedings were

(*p*) Smith & B. 485.

(*q*) Lessee Mullan *v.* Wilton, Smith & B. 73.

(*r*) 28 Geo. III. c. 31, Irish; 14 Geo. II. c. 17, English.

(*s*) Lessee O'Herlihy *v.* M'Carthy, Smith & B. 74; Loveland *dem.* Gaynor *v.* Summers, Smythe, 193; Doe *dem.* Berger *v.* Docker, 6 Dowl. Pr. Ca. 478.

(*t*) Lessee M'Ubrey *v.* Wightman, 5

Law Rec. 283, 2nd series.

(*u*) Lessee Dempsey *v.* Nolan, 4 Irish Law Rep. 490; Longf. & T. 499; and see Lessee Allen *v.* Trant, Cr. & Dix, Abr. Notes, 116; Lessee Sullivan *v.* Sullivan, 3 Law Rec. 130, 2nd series.

(*v*) Short *v.* King, 1 Stra. 681; Adams, 354; and see Riley *v.* Beatty, 6 Irish Law Rep. 100.

(*w*) Doe *dem.* Baker *v.* Roe, 3 Dowl. Pr. Ca. 496.

stayed until the Court should be satisfied that the suit was carried on with her knowledge and authority.

45. Proceedings will also be stayed until security be given, when the sole lessor of the plaintiff, or all the lessors of the plaintiff, reside out of the jurisdiction, but if any lessor of the plaintiff reside in Ireland, security will not be required from a non-resident party: where, therefore, persons materially interested reside out of the jurisdiction, in order to avoid the expense and delay of finding security, it is expedient and customary to introduce a demise in the name of some solvent person resident in Ireland, and it is not requisite that such person should have any interest in the premises in his own right. If the sole lessor of the plaintiff be an infant, the proceedings will be stayed until security given, but if it appear that the infant is a pauper, the infant will be discharged, on the terms of substituting the infant's father for the nominal plaintiff in ejectment. The sole lessor of the plaintiff being an uncertified bankrupt, and his assignees having declined to proceed with the suit, which was carried on exclusively for the bankrupt's benefit, the Court refused to stay the proceedings. If the sole lessor of the plaintiff die before verdict, the proceedings will be stayed until security given, but where a sole lessor of the plaintiff dies after verdict for the defendant, and pending a rule for a new trial, security will not be required until the rule for a new trial is disposed of.

If the lessor of the plaintiff be a native of Ireland, and go abroad merely for a temporary purpose, or if he be engaged in a naval or military capacity, or be employed on the public service, or in a temporary service, security for costs will not be required, but where a sole lessor of the plaintiff, or all the lessors of the plaintiff reside out of the jurisdiction, though they possess adequate property in Ireland to answer any costs which the defendant might be entitled to, in case the suit should prove unsuccessful, yet the action will be stayed until security be given: however, where the party requiring security is

(x) *Denn dem. Lucas v. Fulford*, 2 Burr. 1177; Bull. N. P. 111.

(y) *Anon.* 7 Taunt. 307; *Anon.* 2 Bro. & J. 88; 1 Dowl. Pr. Ca. 300, S. 2; *Doe dem. Bawden v. Roe*, 1 Hodges, 315.

(z) *Anon.* 1 Wils. 130; *Anon.* 1 Cowp. 128; *Doe dem. Selby v. Alston*, 1 T. R. 491.

(a) *Doe dem. Roberts v. Roberts*, 6 Dowl. Pr. Ca. 556; *Throgmorton dem. Giller v. Smith*, 2 Stra. 932; *Ralph v. Director*, 3 Law Rec. 141, 2nd series.

(b) *Doe dem. Colnaghi v. Bluck*, 5 Scott, 714.

(c) *Thrustout dem. Turner v. Grey*, 2 Stra. 1056.

(d) *Doe dem. Cozens v. Cozens*, 1 Q. B. Rep. 426; 1 G. & Dav. 503.

(e) *Anon.* 2 Chitty's Rep. 152.

(f) *Frodsham v. Myers*, 4 Dowl. Pr. Ca. 280; 1 Harr. & Woll. 526.

(g) *Maxwell v. Martin*, 2 Fox & S. 275; *Fennell v. Fitzgerald*, 4 Law Rec. 1st series.

tenant to the lessor of the plaintiff, an undertaking(*h*) made by the absent landlord, that in case of failure, any costs awarded to the tenant shall be allowed to him out of his rent, will be sufficient. The amount of the security required by the Exchequer in ordinary cases is £100, and by the Queen's Bench £50, but no fixed time(*i*) will be limited for entering into such security, the practice being only to stay proceedings, and a previous application(*j*) must be made to the plaintiff's attorney for such security, before the Court will interpose.

46. As a general rule, there is no authority, at common law, to compel a defendant resident within the jurisdiction, to find security for costs, and even an insolvent debtor(*k*) served with an ejectment at the suit of his assignee, may take defence, and will not be ordered to give security: however, as there cannot be a partial eviction of premises for non-payment of rent, a defence taken for part is, in effect, a defence for the whole, and therefore a defence taken(*l*) collusively by, or in the name of a pauper undertenant occupying a small portion of the land, will be set aside, unless security for costs be given by the real defendant.

A person residing out of the jurisdiction, and served with an ejectment for non-payment of rent, may take defence, and will not be required(*m*) to find security for costs; but according to the practice in England, a foreign resident will not be permitted to defend an ejectment(*n*) unless security be given; and where such a party is not served and applies for liberty to defend, he is only allowed to do so(*o*) on the terms of finding security: a defence taken to an ejectment on the title, in the name of the immediate tenant(*p*), who went abroad shortly after being served with the declaration, was ordered to be set aside unless security given, as it appeared that the defence was entered by an undertenant in the name of his absent lessor, without his authority, for the purpose of evading costs.

(*h*) *Lessee Nagle v. Power*, 1 Jones's Exch. Rep. 420.

(*i*) *Broughton v. Jeremy*, 1 Harr. & Woll. 525.

(*j*) *Bass v. Clive*, 3 M. & Selw. 283; *Adams v. Brown*, 9 Bing. 81; 2 Moo. & Sc. 154.

(*k*) *Lessee Evans v. Reilly*, 1 Jones & C. 152; 1 Irish Law Rep. 230; *Lessee O'Brien v. Dwyer*, 4 Irish Law Rep. 380; *Lessee Geale v. Hurst, Hayes & J.* 751, for nonpayment of rent; *Lessee Colclough v. Magill*, 6 Irish Law Rep. 220.

(*l*) *Doe dem. Vaughan v. Richardson*,

2 Huds. & Br. 117; 1 Law Rec. 356, O. S.; *Lessee Henderson v. Haghan*, 2 Ir. Law Rep. 231; *Doe dem. Greer v. Kelly*, 2 Huds. & Br. 118; *Lessee Pilkington v. Scott*, 4 Law Rec. 208, 2nd series.

(*m*) *Jack dem. Gilston v. Howard*, 2 F. & Sm. 127.

(*n*) *Doe dem. Hudson v. Jameson*, 4 M. & Ry. 570.

(*o*) *Lessee Montgomery v. Ejector*, Vern. & Scr. 104; *Lessee Bryan v. Ejector*, Irish T. R. 570.

(*p*) *Lessee Stewart v. Bartholomew*, 1 Irish Law Rep. 377.

the proceedings in a second ejectment will be stayed until the former ejectment(*q*) upon the same title, or between the same parties, shall be satisfied, and this rule will be enforced whether the second ejectment is brought by the same lessor of the plaintiff, or defendant in the prior ejectment(*r*), or whether both ejectments are brought upon the demises of the same, or of different persons, or against all, or only some of the same parties(*t*), or for the same, or different premises, or in the same or in different courts, so as long as the suits are brought on the same title, and for recovery of the same estate: and it is not material whether the first ejectment was decided on the merits, or by nonsuit(*tt*), or against the casual tenant, or the length of time suffered to elapse between the first and second ejectments, without making any application for the costs, is immaterial, as such costs may not have been demanded in consequence of the acquiescence of the party, or with a view of putting an end to further litigation.

Where several successive ejectments are brought for the recovery of the same estate, but none of them tried, proceedings in a subsequent ejectment will not be stayed(*u*) until the costs of the former ejectments are paid: and where a second ejectment is brought against the defendant in a former ejectment, it is not settled whether such second ejectment shall be stayed, until the costs of the former unsuccessful ejectment shall be paid to the *executors* of the former defendant. However, where a second ejectment is brought by an heir, to recover parcel of land devised by his ancestor, proceedings will not be stayed until payment of the costs of a former ejectment brought by the same heir on the same title, for recovery of a different part of the estate devised to other persons, the second ejectment neither being against the same parties, nor for the same subject-matter.

Proceedings will be stayed in a second ejectment brought on the behalf of an infant(*w*), until the costs of a former ejectment on the behalf of the same infant shall be paid; or in a second ejectment by

dem. Angel *v.* Angel, 6 T.

dem. Cotterell *v.* Roe, 1
195; Lessee Duhigg *v.*
Hill, 10 L. J. 212.

dem. Williams *v.* Hold-
stock, 223; Doe *dem.* Walker *v.*
Hill, 3 Bos. & P. 22; Doe *dem.*
Hill, 8 T. R. 645; Doe *dem.*
Hill, 2 Fox & S. 185.

dem. Rees *v.* Thomas, 4 Ad.
Doe *dem.* Mudd *v.* Roe, 8
L. J. 444.

dem. Angel *v.* Angel, 6 T.

R. 746.

(*tt*) Doe *dem.* Maslin *v.* Packer, 4
Tyrw. 144; 2 Cro. & M. 457; Harvey
dem. Beale *v.* Baker, 2 Dowl. Pr. Ca.
75, N. S.

(*u*) Doe *dem.* Blackburne *v.* Standish,
2 Dowl. Pr. Ca. 26, N. S.

(*v*) Doe *dem.* Taylor *v.* Harris, 4
Mann. & Ry. 569; but see Doe *dem.*
Heighley *v.* Harland, 10 Ad. & Ell.
761.

(*w*) Ralph *v.* Ejector, 3 Law Rec. 141,
2nd series.

the assignee of an insolvent debtor, until the costs of a former ejectment(*x*) brought by the insolvent, before his insolvency, shall be paid, although any remedy for the costs of the prior ejectment had been lost by reason of the insolvent's discharge. Proceedings in a second ejectment will be stayed, not only until the costs of a former ejectment, but the costs(*y*) of an action for the mesne profits shall be satisfied, though the rule will not be extended to include the damages(*z*) adjudged in such an action, nor the costs of a suit in Equity(*a*) instituted by the same party for recovery of the same premises, nor will the defendant, after obtaining a rule to stay proceedings, be allowed(*b*) to *nonpro* the second ejectment, unless the costs should be paid within a limited time.

The stay of proceedings in a second ejectment until payment of the costs of a former ejectment between the same parties, is not an inflexible rule, if the fact should clearly appear(*c*) that the verdict in the first action was obtained by means of fraud and perjury, or forgery; but as such a preliminary investigation must be attended with great inconvenience, the rule requiring security(*d*) is now generally enforced. A person served with an ejectment cannot stay proceedings until payment of the costs of a former ejectment, unless he has taken defence, as he cannot complain(*e*) of being harassed without becoming a party to the suit.

48. By the Statute(*f*) 1 Geo. IV. c. 87, it is enacted, that where the term or interest of any tenant, then or thereafter holding under a lease, or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or

(*x*) Doe *dem.* Standish *v.* Roe, 5 B. & Adol. 878; 2 Nev. & M. 468; Doe *dem.* Heighley *v.* Harland, 10 Ad. & El. 761; Lessee Cardale *v.* O'Connell, 6 Irish Law Rep. 208.

(*y*) Doe *dem.* Pinchard *v.* Roe, 4 East, 585; Doe *dem.* Maslin *v.* Packer, 4 Tyrw. 144; 2 Cro. & M. 457.

(*z*) Doe *dem.* Church *v.* Barclay, 15 East, 233.

(*a*) Doe *dem.* Williams *v.* Winch, 3 B. & Ald. 602.

(*b*) Doe *dem.* Sutton *v.* Ridgway, 5

B. & Ald. 523.

(*c*) Doe *dem.* Rees *v.* Thomas, 2 B. & Cress. 622; 4 D. & Ry. 145; but see Doe *dem.* Rees *v.* Thomas, 4 Ad. & Ell. 348; Jack *dem.* Rutledge *v.* Rutledge, 1 Jebb & S. 687.

(*d*) Jack *dem.* Gleeson *v.* Gleeson, 1 Jebb & S. 271.

(*e*) Doe *dem.* Crockett *v.* Roe, 1 Har. & Woll. 351; but see Lessee Kirwan *v.* Ejector, Smith & B. 200.

(*f*) 1 Geo. IV. c. 87, s. 1, England and Ireland.

usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced, on the first day of the term then next following, there to be made defendant, and to find such bail, if ordered by the Court, and for such purposes as are herein-after next specified; and upon the appearance of the party at the day prescribed, or in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or has been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded, to move the Court for a rule requiring such tenant or person to shew cause, within a time to be fixed by the Court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, beside entering into the common rule and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgement to be entered up against the real defendant, of the term next preceding the time of trial, and also why he should not enter into a recognizance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action: and it shall be lawful for the Court, upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings and find such bail, with such conditions and in such manner as shall be specified in the rule, or such part of the same so made absolute: and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgement for the plaintiff: and that in all cases(g) wherein the landlord shall elect to proceed in ejectment under the provisions therein-before contained, and the tenant shall have found bail, as ordered by the Court, then if the landlord,

(g) 1 Geo. IV. c. 87, s. 6, England and Ireland.

upon the trial of the cause, shall be nonsuited, or a verdict pass against him, upon the merits of the case, there shall be judgement against him with double(*h*) costs.

49. If the interest of a tenant for a term of years, or for any ascertained portion of a year, or from year(*i*) to year, held under a lease, or agreement *in writing*, expire by lapse of time, or be determined by regular notice to quit given either by the landlord or by the tenant, and an ejectment on the title be brought for recovery of the possession, the tenant may be compelled by force of this Statute either to enter into a recognizance(*j*) with sufficient sureties for payment of the damages and costs, or, in default of his compliance, judgement may be entered up by the landlord against the casual ejector. A tenancy under an agreement *in writing* for three months(*k*) certain, is a holding within the meaning of the Act; but a tenant from year to year, holding by parol(*l*), without any lease or written agreement, though his interest be determined by regular notice to quit, does not come within its operation. A holding for a life(*m*) or lives, or for a term of years(*n*), determinable on the fall of a life or lives, or for any other uncertain period, such as the minority(*o*) of a person beneficially interested in the premises, will not entitle a landlord, on bringing an ejectment, to compel the tenant to find security under the Statute.

A tenant under a lease for fourteen years, determinable at the end of seven years by either party, gave due notice of his intention to quit at the end of seven years(*p*), which the landlord accepted; but the tenant having refused to quit on the expiration of his notice, it was ruled he was not bound to give security for costs, because the tenancy was not determined either by efflux of time or by the usual notice to quit. So a tenant for years, who duly surrendered his term and afterwards(*q*) refused to quit, was held not to be compellable to find security within the Act; nor where the tenant was suffered to continue in possession(*r*) for a year after the lease had expired, without any steps being taken for recovery of the premises; nor where there is a dis-

(*h*) Reduced to single costs by 5 & 6 Vict. c. 97.

(*i*) Lessee Keily *v.* Ejector, 1 Jebb & Symes, 404, cited.

(*j*) Doe *v.* Roe, 2 Dowl. Pr. C. 180.

(*k*) Doe *dem.* Phillips *v.* Roe, 5 B. & Ald. 766; 1 D. & Ry. 433.

(*l*) Doe *dem.* Ld. Bradford *v.* Roe, 5 B. & Ald. 770.

(*m*) Anon. 2 Law Rec. 133, 2nd ser.; Anon. 1 Law Rec. 342, O. S.

(*n*) Doe *dem.* Pemberton *v.* Roe, 7 B.

& Cress. 2.

(*o*) Lessee Hobson *v.* Ejector, Hayes, 49; Lessee Orpen *v.* Ejector, 2 Irish Law Rep. 291.

(*p*) Doe *dem.* Ld. Cardigan *v.* Roe, 1 Dowl. & Ry. 540; Jack *dem.* Duke of Devonshire *v.* Lynch, 1 Jebb & Symes, 403; 1 Irish Law Rep. 6, S. C.

(*q*) Doe *dem.* Tindal *v.* Roe, 2 B. & Adol. 922; 1 Dowl. Pr. C. 143, S. C.

(*r*) Doe *dem.* Thomas *v.* Field, 2 Dowl. Pr. C. 542.

pute(s) about the title, as the Statute only applies to cases where the landlord's title is clear; nor where the tenant enters under an equitable agreement in writing for a lease for a specified term, and before its regular(t) expiration is served with notice to quit, because the yearly tenancy arises from payment of rent, and not by force of the written contract. A tenancy from quarter to quarter, determinable by notice at the end of any three months, does not constitute an agreement for a term(u) certain within the meaning of the Act, as the term is uncertain until notice to quit be actually given. Under a yearly holding, by agreement in writing from three landlords, who were tenants in common, the tenancy, as to an undivided third part, was put an end to by a notice to quit, which extended to the whole of the premises, and possession was, in like manner, demanded of the entire: an ejectment being brought for an undivided(v) third part, on a motion that the tenant should enter into the usual recognizances, it was contended that the Act only applied where the landlord was entitled to the whole of the premises, but the objection was overruled.

50. A notice in writing signed by the landlord or by his agent(w), demanding possession of the premises, must be served prior to bringing the ejectment, and a written or printed notice, subscribed(x) with the name of the landlord, or of his attorney, requiring the tenant "to appear in Court(y), on the first day of the ensuing term, to be made a defendant to the ejectment, and then to find such bail and enter into such recognizance, and give such undertakings as shall be ordered by the Court pursuant to the Statute," is to be annexed to the ejectment in addition to the usual notice signed in the name of the casual ejector at foot of the declaration. The notice annexed to the ejectment requiring bail may be signed by A. B. as agent for the plaintiff(z), instead of describing him as agent for the lessor of the plaintiff, or for the landlord, and it is quite sufficient if a notice be addressed to the tenant to appear and be made defendant and find bail pursuant to the

(s) Doe *dem.* Sanders *v.* Roe, 1 Dowl. Pr. C. 4.

(t) Anon. 1 Law Rec. 342, O. S. by Pennefather, Baron.

(u) Doe *dem.* Carter *v.* Roe, 10 Mees. & W. 670; 2 Dowl. Pr. Ca. 449.

(v) Doe *dem.* Morgan *v.* Rotheram, 3 Dowl. Pr. Ca. 690; 1 Gale, 157.

(w) Doe *dem.* Beard *v.* Roe, Tyrw. & Gr. 870; 1 Mees. & W. 360, S. C.

(x) Jack *dem.* Spollen *v.* Thrustout, 1 Huds. & Br. 354; and see Anon. 1 D. & Ry. 435; Doe *dem.* Sampson *v.* Roe, 6 Moore, 54.

(y) Doe *dem.* Holden *v.* Rushworth, 4 Mees. & W. 74; 6 Dowl. Pr. C. 712; S. C.

(z) Doe *dem.* Beard *v.* Roe, Tyrw. & Gr. 870; 1 Mees. & W. 360, S. C.

Statute ; and it is not requisite it should appear by affidavit(*a*), that person signing such notice was the landlord's agent. The Exchequer held that the notice demanding possession required by the Statute should be served prior(*b*) to, or at the time of the determination of the tenant's holding, but the King's Bench subsequently decided that the landlord(*c*) was not obliged to give the written notice requiring the tenant to deliver up possession previously to the expiration of the term and the Exchequer have since acquiesced in the opinion(*d*) expressed by the King's Bench on the subject. On a holding from year to year under a written agreement, the usual notice(*e*) to quit, given by the landlord, is a sufficient demand of possession within the meaning of the Act. The affidavit of service of the notice(*f*) demanding possession must be entitled in the ejectment cause, and the recognizance ought also to be entitled in the cause(*g*) against the real defendant and not against the casual ejector.

51. Affidavits must be made verifying all the facts necessary to support the application, such as the nature of the instrument, under which the premises were holden, the time when the tenancy ended, the manner of its determination, and the demand of possession, and if the tenancy were determined by notice to quit, signed by an agent on behalf of the landlord, the affidavit(*h*) must shew that the notice to quit was given by the landlord's authority, and the affidavits must be correctly entitled in the ejectment cause(*i*) against the real defendant and the names of all the lessors of the plaintiff must be set out.

The tenant having absconded and gone to America, service of the notice demanding possession was effected on his wife, who retained possession, by putting the notice under the door, which the wife refused to open ; and a conditional order was granted(*j*) that such service should be sufficient. Though it is requisite that the agreement under which the tenant held should be verified by affidavit, it is not

(*a*) Doe *dem.* Geldart *v.* Roe, 1 Willm. Woll. & H. 346.

(*b*) Loveland *dem.* Roberts *v.* Thrustout, 1 Huds. & Br. 354, note.

(*c*) Jack *dem.* Spollen *v.* Thrustout, 1 Huds. & Br. 354.

(*d*) Lessee *Ld.* Bandon *v.* Ejector, 6 Law Rec. 318, 2nd series.

(*e*) Doe *dem.* *Ld.* Anglesey *v.* Roe, 2 D. & Ry. 565 ; Loveland *dem.* Roberts *v.* Thrustout, 1 Huds. & Br. 354, note.

(*f*) Jack *dem.* Spollen *v.* Thrustout,

1 Huds. & Br. 202.

(*g*) Roe *dem.* Durant *v.* Moore, 6 Bing. 656 ; 4 Moore & P. 531 ; 1 Willm. Woll. & Dav. 75.

(*h*) Doe *dem.* Beard *v.* Roe, 1 Mee & W. 360.

(*i*) Doe *dem.* Watson *v.* Roe, 1 Willm. Woll. & Dav. 75 ; Doe *dem.* Pryme *v.* Roe, 8 Dowl. Pr. Ca. 340 ; Doe *dem.* Cousins *v.* Roe, 7 Dowl. Pr. Ca. 53.

(*j*) Doe *dem.* Selgood *v.* Roe, Willm. Woll. & H. 206.

ry(*k*) it should be proved by the attesting witness, but execution of the instrument(*l*) of demise by the lessee must be so positively, and where the defendant's attorney was a sub-witness to the lease, he was ordered(*m*) to make an affidavit in support of an application under the Statute. The security can only be drawn up on reading the original lease, or some counterpart or duplicate thereof, and, therefore, the original instrument be not *stamped*(*n*) at the time of obtaining it, the defect cannot be supplied by subsequently affixing a penal stamp to the instrument.

In answer to a rule to shew cause why the defendant should not be put into the usual recognizance, an affidavit was made by the defendant admitting service of the notice to quit, but alleging he had not retaken the premises(*o*) by parol, and had ever since held under such new contract, which was then subsisting; but the order was made absolute, because it was not stated for what period, or on what terms the tenancy had been renewed.

The jurisdiction conferred by this Statute is subject to the discretion of the Court(*p*), and where the landlord has been guilty of laches in not requiring security, or where a trial may be speedily had and circumstances of peculiar hardship are disclosed, the Court will not insist on the order, but in the absence(*q*) of any affidavit by the tenant shewing any good ground for defending the suit, the order requiring security shall be made absolute; after an absolute order that the tenant in possession and those deriving under him shall find security for the rents and profits which shall be recovered by the plaintiff, unless the rule be complied with, all persons are prevented(*r*) from taking defence, and judgment may be marked as in ordinary cases where no defence is entered, and any defence taken without obeying the rule, will be set aside on application to the Court.

After the appointment of a receiver by a Court of Equity to receive the rents and profits of demised premises, if the landlord or his

See dem. Avery v. Roe, 6 Dowl. 18; *Doe dem.* Gowland v. Roe, Pr. C. 35; *Doe dem.* Morgan v. Ram, 3 Dowl. Pr. C. 690; 17, S. C.

See dem. Beard v. Roe, 2 Gale's

See dem. Avery v. Roe, 6 Dowl. 18.

See dem. Caulfield v. Roe, 3 Bing. 19; 5 Dowl. Pr. C. 365; and see

Doe dem. Holder v. Rushworth, 4 Mees. & W. 74.

(*o*) *Roe dem.* Durant v. Doe, 6 Bing. 574.

(*p*) *Lessee* Ld. Bandon v. Ejector, 6 Law Rec. 318-323; *Lessee* Clooney v. Ejector, 4 Irish Law Rep. 413.

(*q*) *Lessee* Flynn v. Ejector, 1 Irish Law Rep. 72.

(*r*) *Lessee* Connolly v. Ejector, 5 Law Rec. 12, 2nd series.

solicitor be aware of such appointment(*s*), leave must be obtained from the Court, on a motion for that purpose, to proceed by either on the title, or for non-payment of rent, or if an ejectment is served by a landlord who is not aware that a receiver was appointed over his tenant's lands, as soon as the existence of a receiver is discovered, leave must be obtained for liberty to prosecute to execute the writ of possession, as a superior Court with possession of property cannot suffer any interference with its proceedings unless permission be granted.

(*s*) *M'Donnell v. Clarke*, 2 Hogan, 108; *Evans v. Norcott*, 1 Longf.

CHAPTER VI.

PROCEDURE IN EJECTMENT.

Consent for Judgement.

Death of sole Defendant after Commission-Day of Assizes.

— before Commission-Day.

Relief given, after a Party's Death, to avoid the Statute of Limitations.

Death of sole Defendant after Consent for Judgement.

Death of one of several Defendants.

Marriage of Feme-sole Defendant before Trial.

Death of sole Lessor of the Plaintiff.

Costs of Nonsuit lost by Death of Party before Trial.

Survivor of Judgement in Ejectment.

Death of sole Lessor of the Plaintiff, being only Tenant for Life.

Writ of Restitution.

Writ of Ejectment.

67. *Proceedings under Stat. 1 Geo. IV. c. 87, for mesne Profits.*

68. *Certificate for immediate Execution.*

69. *Costs against Defendant not appearing on the Trial.*

70. *— after Verdict and Judgement.*

71. *Real Defendant, though not a Party, ordered to pay Costs.*

72. *Where Plaintiff nonsuited on Merits, or Verdict against him.*

73. *Execution of the Writ of Possession.*

74. *When renewed.*

75. *Execution of habere as to growing Crops.*

76. *Liability of Sheriff for delay in executing habere.*

77. *Warrant of Attorney to confess Judgement, and issue habere, contemporaneous with Demise.*

AFTER defence taken to an ejectment and with the view of expense, a consent, signed by the defendant's attorney(a), is duly given, "that judgement shall be forthwith entered for the plaintiff, with release of errors and stay of execution" until some specified time, being usually the time at which judgement could be obtained by the plaintiff's attorney, he will be bound(b) by the stay of execution entered in the instrument. Formerly where a consent for judgement with stay of execution, was filed without the concurrence of the defendant's attorney, an order might have been obtained(c) to expunge the stay of execution, upon which judgement was entered, and execution forthwith issued; the mode of proceeding in this respect, however, has been altered, as it is considered contrary(d) to principle to strike out the stay of execution, subject to which the consent is filed, and treat it as

see *Dickenson v. Dyas*, Batty, 10 Q. B. 201, note.

see *Finlay v. Ladley*, Batty, 10 Q. B. 201.

see *dem. Lawless v. Mowlds*, 1

Jebb & S. 686; *Lessee Verner v. Rorke*, 2 Law Rec. 148, 2nd ser.

(d) *Beaumont v. Brassington*, 1 Jones's Exch. Rep. 311; 2 Law Rec. 275, 2nd ser.

an absolute authority to issue immediate execution; the course now pursued, in such cases, is to set aside the consent for judgement with costs as a mere nullity, and Joy, C. B., observed, that the suit was to be prosecuted, as if no such document ever existed, but the other Courts(e) give the plaintiff liberty to mark judgment against the casual ejector. The defendant's attorney having refused to sign consent for judgement, which had been signed by his client, the officer of the Court refused to act upon it without the attorney's signature, and the Court(f) declined to interfere unless it should be satisfactorily shewn that the attorney was guilty of impropriety, or was actuated by caprice in withholding his sanction. Although a consent for judgement be given, it will be necessary to proceed with the ordinary rules for the purpose of obtaining judgement against the casual ejector, so as to bind other persons who were served with the ejectment; the regular course being to mark judgement(g) against the casual ejector, and not against the party to the consent.

55. At common law the death of a sole plaintiff or of a sole defendant, at any time before final judgement, caused an abatement of the suit, but by the Irish Statute(h), 7 Will. III. c. 7, it is enacted, that in all actions real and personal, or mixed, the death of either party between the verdict and the judgement shall not be alleged for error, so as judgement be entered within two terms after such verdict.

If a sole defendant in ejectment die *after* the commission-day(i) of the assizes, and a verdict be given after his death, judgement may be entered under the Statute for or against him, as if he were alive, at any time within two terms after the verdict, the assizes being, in law, considered as one day; but if the lessor of the plaintiff be nonsuited, the costs will be lost, because the consent rule is(j) merely personal, and the Statute(k) does not extend to cases of nonsuit.

Upon the trial of an ejectment for nonpayment of rent a verdict was entered for the lessor of the plaintiff, subject to the opinion of the Court on a point saved, and while the case was depending for judgement, and after more(l) than two terms had elapsed, the sole defend-

(e) *Clarke v. Butler*, 1 Jebb & S. 268; *Crawf. & Dix*, 464; *Hargrave v. Butler*, 6 Law Rec. 38, S. C.; *Jackson v. Warburton*, Smythe, 474.

(f) *Lessee Penny v. Beasley*, Alc. & Nap. 177.

(g) See *Doe dem. Duke of Devonshire v. Uniacke*, 1 Huds. & Br. 619; *Smith v. Jones*, 8 Mod. 118.

(h) 7 Will. III. c. 7, s. 2, Irish; 17

Car. II. c. 8, s. 1, English.

(i) Anon. 1 Salk. 8.

(j) *Thrustout v. Bedwell*, 2 Wils. 7.

(k) *Dowbiggin v. Harrison*, 10 B. & Cress. 480; 5 Mann. & Ry. 431, S. C.; *Doe dem. Lintot v. Ford*, 2 Smith's Rep. 408.

(l) *Jack dem. Purcell v. Kirby*, MSS. K. B. Mich. 1835.

ant died: in the term following his death the question was argued, and judgement of nonsuit was ordered to be entered.

56. If a sole defendant die *before* the commencement of the assizes, the suit abates, and a new ejectment must be brought; and though a verdict(*m*) pass for the lessor of the plaintiff upon full evidence, the judgement may, upon motion, be arrested, or will be reversed on writ of error.

57. A sole defendant in ejectment having died before trial, and the lessor of the plaintiff not being guilty of any wilful delay, the Court, for the purpose of preventing(*n*) the bar of the Statute of Limitations from attaching, ordered that the lessor of the plaintiff should be at liberty to mark judgement against the casual ejector, and issue execution, unless the devisee of the deceased party, or the tenant in possession, should appear and defend the action.

58. If the defendant in ejectment give a consent for judgement, the Court will permit judgement(*o*) to be entered up after the defendant's death, as of the term when the consent was signed: and where a tenant gave a consent for judgement in an ejectment for non-payment of rent, with stay of execution until the following term, and the lessor of the plaintiff died before judgement was marked, the Court, on debate(*p*), allowed judgement to be entered in the next term after his death, at the suit of the feigned lessee.

59. By the Irish Statute(*q*), 9 Will. III. c. 10, s. 7, it is enacted, that if two or more persons shall be jointly plaintiffs in any action against two or more persons likewise jointly named defendants therein, the death or deaths of one or more of such plaintiffs or defendants shall not abate such writ in such action, but that the same being suggested on the roll or record, it shall be lawful for the surviving plaintiff or plaintiffs in such action to proceed to judgement against the surviving defendant or defendants as if such death had not been.

If defence be taken to an ejectment by two persons jointly, and one of them die at any(*r*) time before judgement, the death of such party may be suggested on the roll, and the action may proceed against the survivor; but if each defendant separately take defence for

(*m*) Anon. 1 Salk. 8; Lessee Aylmer v. M'Neill, Crawf. & Dix, 368; Lessee Hastings v. Ejector, 4 Irish Law Rep. 404.

(*n*) Doe *dem.* Grubb v. Grubb, 5 B. & Cress. 457.

(*o*) Doe *dem.* Duke of Devonshire v. Unicke, 1 Huds. & Br. 619; and see

the note to Wheatley v. Lane, 1 Saund. 219, F.

(*p*) Lessee Wier v. Allen, 2 How. Law Exch. 67, K. B. 1754.

(*q*) 9 Will. III. c. 10, s. 7, Irish; 8 & 9 Will. III. c. 11, s. 7, English.

(*r*) Farr v. Denn, 1 Burr. 362; Gree v. Rolle, 1 Ld. Raym. 717; Withers v.

a part only, or if several defendants join in their defences under a consolidation rule, and one of such parties(*s*) die before the assizes, an execution cannot be issued for the lands covered by the defence of *the* deceased party, because there is no person in Court against whom judgement can be given or execution obtained. A verdict in ejectment being obtained against husband and wife, and the husband having died, it was ruled(*t*), that upon a suggestion of his death the plaintiff was entitled to judgement against the survivor, because the ejectment was said to be in nature of an action of trespass, and the wife was charged for her own act.

60. In an ejectment against a *feme sole*, who married before the trial, and after verdict against her, judgement was marked and a writ of possession was issued(*u*) against her in her original name, which was held to be regular, as the verdict established she had no interest in the premises capable of being transferred to her husband.

61. The death of a sole lessor of the plaintiff does not abate(*v*) an ejectment suit, because it appears by the frame of the record, that a subsisting demise(*w*) is vested in the nominal plaintiff: the lessor of the plaintiff, in an ejectment for nonpayment of rent, having died after defence taken, and before the assizes, judgement was entered against the casual ejector, in consequence of the non-appearance of the defendant on the trial, and a writ of possession was executed: upon a motion for a writ of restitution, stating by affidavit the death of the lessor of the plaintiff before the assizes, the Court decided that his death did not cause(*x*) an abatement of the suit, and that the Ejectment Acts having substituted service of the ejectment for demand and re-entry at common law, worked as complete an eviction of the tenant's interest, when followed by judgement and execution, as a regular demand and re-entry would have done at common law for a condition broken, and that if the defendant were to be restored, he could only be reinstated as a trespasser.

62. If a sole lessor of the plaintiff die before the assizes(*y*), and the nominal plaintiff be nonsuited, by reason of the non-appearance of the

Harris, 2 Ld. Raym. 808.

(*s*) Adams, 382; Gilb. on Eject. 98.

(*t*) Rigby v. Lee, Cro. Jac. 356, decided before the Stat. 17 Car. II. c. 8; Lee v. Rowkeley, 1 Ro. Rep. 14.

(*u*) Doe dem. Taggart v. Butcher, 3 M. & Selw. 557.

(*v*) Thrustout dem. Turner v. Grey, 2 Stra. 1056.

(*w*) Doe dem. Byne v. Brewer, 2 Chitty's Rep. 323; Jack dem. Newton v. Byrne, 3 Irish Law Rep. 35; Doe dem. Beyer v. Roe, 4 Burr. 1970; Doe dem. Cozens v. Cozens, 1 Gale & Dav. 503; 1 Q. B. Rep. 426.

(*x*) Jack dem. French v. Dillon, MSS. K. B. 10th July, 1821.

(*y*) Thrustout v. Bedwell, 2 Wils. 7.

defendant on the trial, or in case a verdict pass for the defendant, the remedy for costs, being merely personal, will be lost: and where the lessor of the plaintiff died after the commission-day, and the nominal plaintiff was nonsuited on the merits, it was ruled(*z*) that the executor of the lessor of the plaintiff was not liable for the costs, as the consent rule was merely personal, and the provisions of the Statute(*a*) did not extend to cases of nonsuit(*b*): but where the lessor of the plaintiff died after verdict in his favour, and the costs of the cause were taxed by consent, the defendant was ordered(*c*) to pay the amount to the personal representative of the lessor of the plaintiff.

63. If a writ of possession be not sued out within a year and a day after judgement in ejectment, whether against the casual(*d*) ejector or against a real(*e*) defendant, the suit must be revived by *scire facias* against the terre-tenants, or against the defendant and terre-tenants, before execution can be issued. In like manner, whenever a new person becomes chargeable to the execution of a judgement, who was not a party to the record, a *scire facias* must be issued to make him a party to the judgement, and therefore upon the decease of a defendant who is solely chargeable, after judgement and before execution, a *scire facias* must issue to revive the judgement; but the death of a sole lessor of the plaintiff, after judgement and before execution, does not render a revival of the judgement(*f*) necessary, because the nominal plaintiff has a subsisting interest sufficient to maintain the suit. It is not, however, an unusual precaution to revive a judgement in ejectment after the death of the only(*g*) lessor of the plaintiff. In the Exchequer leave must be obtained(*h*) to issue a *scire facias* to revive judgement in ejectment, and the application must be grounded on an affidavit shewing that no change in the right of the party to the possession had taken place subsequently to the judgement, and accounting for the delay. It is unnecessary to apply(*i*) for such permission in the Queen's Bench, but after a writ of possession has been

(*z*) Doe *dem.* Pain *v.* Grundy, 1 B. & Cress. 284; 2 D. & Ry. 437, S. C.

(*a*) 7 Will. III. c. 7, s. 2, Irish; and Car. II. c. 8, s. 1, English.

(*b*) Doe *dem.* Lintot *v.* Ford, 2 Smith's Rep. 408; Dowbiggin *v.* Harrison, 10 B. & Cress. 480; 5 M. & Ry. 431.

(*c*) Goodright *v.* Holton, Barnes, 119.

(*d*) Proctor *v.* Johnson, 2 Salk. 690; Lord Raym. 669.

(*e*) Withers *v.* Harris, 2 Ld. Raym. 13; 1 Salk. 258.

(*f*) Jack *dem.* Newton *v.* Byrne, 3 Irish Law Rep. 35; Doe *dem.* Beyer *v.* Roe, 4 Burr. 1970.

(*g*) Lessee Reford *v.* Ejector, 5 Law Rec. 294; Lessee Baker *v.* Ejector, Crawf. & Dix, 192; 6 Law Rec. 249, S. C.

(*h*) Lessee Reford *v.* Ejector, 5 Law Rec. 294.

(*i*) Lessee Pope *v.* Ejector, Alc. & Nap. 43; Glasc. 13.

executed, it is irregular(*j*) to revive the judgement for the purpose retaking possession.

64. Upon the decease of a lessor of the plaintiff pending an ejectment, who was merely tenant for his own life, the possession is not to be recovered, but the ejectment is the medium(*k*) through which the mesne profits of the lands are to be enforced. A party having a right to the possession on the day of the demise and at the time of serving his ejectment, which expires or is determined before the trial, he may continue(*l*) the proceeding for the purpose of recovering the mesne profits which accrued during the time the defendant was a trespasser, but the Court will not allow any writ of possession to be executed. So where the title of the lessor of the plaintiff was within two days of expiring, and the party taking defence(*m*) was entitled to the immediate estate in reversion, though such defence might have been considered irregular, the Court refused to direct that a writ of possession should be issued.

The only lessor of the plaintiff in an ejectment for non-payment of rent having died after defence taken and before the assizes, judgement was marked against the casual ejector by reason of the defendant's(*n*) non-appearance on the trial, and the writ of possession was executed. Before the time for redeeming had elapsed, an application was made, on behalf of the defendant, for a writ of restitution, upon affidavit stating the death of the lessor of the plaintiff before the assizes, and that he was *only tenant of the premises for his own life*, but the Court held that after execution executed they were prohibited, by the express provisions of the Ejectment Acts, from granting any relief.

65. A writ of restitution(*o*) will not be awarded, nor will a regular judgement be set aside, nor will liberty be given to take defence(*p*), unless the party omitted to be served, or defectively served, or claiming a right to defend the ejectment, make an affidavit denying that he was served with the ejectment, or that he had notice of the proceedings, and shewing not only(*q*) a title to the lands, but that he was in

(*j*) Jack *dem.* Ashley *v.* Ejector, 2 Jebb & S. 162; 2 Irish Law Rep. 264; and see Lessee Keatinge *v.* Ejector, Batty, 431.

(*k*) Doe *dem.* Morgan *v.* Bluck, 3 Campb. N. P. C. 450.

(*l*) Jack *dem.* Johnston *v.* Stewart, Smith & B. 369; Thrustout *dem.* Turner *v.* Grey, 2 Stra. 1056; Capel *v.* Saltonstal, 3 Mod. 249 *argo.*; and see Jones *dem.* M'Donnell *v.* Grady, 2 Huds. & Br. 537.

(*m*) Jack *dem.* Thompson *v.* Andrews,

1 Jebb & S. 547.

(*n*) Jack *dem.* French *v.* Dillon, MSS. K. B. July, 1821.

(*o*) Doe *dem.* Williams *v.* Williams, 4 Nev. & M. 259; 2 Ad. & Ell. 381; M'Culloch *v.* M'Christie, 1 Law Rec. 308; Lessee Archp. of Dublin *v.* Ejector, 3 Irish Law Rep. 12.

(*p*) Lessee White *v.* Ejector, 1 Law Rec. 151, 2nd series.

(*q*) Doe *dem.* Thomson *v.* Roe, 1 Dowl. Pr. Ca. 115; Lessee Gamble *v.* Ejector, 1 Law Rec. 94, 2nd series.

ion, or in receipt of the rents(*r*) at the time of the alleged ser- collusion(*s*) must be shewn between the lessor of the plaintiff occupier.

arty in possession having instructed an attorney to defend an nt, but through mistake(*t*) of the name of the lessor of the he was unable, after search made in the proper office, to that such ejectment had been moved on, the Court set e judgement, which was duly entered, as obtained by surprise, ment of costs, and on undertaking to try the cause at the ensu- zes, and possession was ordered to be restored in the mean to after judgement marked against the casual ejector, and after of possession was partly executed, upon an affidavit by a a possession, stating he had instructed an attorney to take de- n his behalf, which, through inadvertence, had not been and that the party applying had a good defence on the me- still continued in possession, an order was made to set aside gement on payment of costs, and leave was given to take

order for a writ of restitution can only be made(*v*) by the nd not by a judge in chambers, and the necessary affidavit to such an application should be made(*w*) by the party himself, by his attorney. A writ of restitution only lies against(*x*) o the record, and where judgement against the casual ejector de after execution executed, or where the writ of possession is and the judgement(*y*) is undisturbed, the proper course is, to r an order(*z*) commanding the lessor of the plaintiff to restore n, and after service of the order, and refusal to comply, an ent will be granted. A party irregularly evicted waives his

Ledger *v.* Roe, 3 Taunt. 566.
see Green *v.* Ejector, 2 Law
1st series; Lessee Lodge *v.*
Law Rec, 115, 2nd series.
dem. Thomson *v.* Roe, 4
Ca. 115; Goodtitle *v.* Bad-
unt. 820.
dem. Fowler *v.* Roe, 1 Ld.
380; Doe *dem.* Shaw *v.* Roe,
260.
dem. Mullarky *v.* Roe, 11
. 333; 3 P. & Dav. 316; Doe
r *v.* Roe, 2 Harr. & W. 130;
Ingram *v.* Roe, 11 Price, 507.
dem. Williams *v.* Williams,

4 Nev. & M. 259; 2 Ad. & Ell. 381;
and see Doe *dem.* Stephens *v.* Lord, 7
Ad. & Ell. 610.

(*w*) Lessee Jones *v.* Mills, 1 Law Rec.
46, 2nd series; Lessee Gamble *v.* Ejec-
tor, 1 Law Rec. 94, 2nd series.

(*x*) Rex *v.* Leaver, 2 Salk. 587.

(*y*) Doe *dem.* Stephens *v.* Lord, 7 Ad.
& Ell. 610; 2 Nev. & P. 604, S. C.; and
see Longf. on Ejectment, 229; Doe *dem.*
Stratford *v.* Shaill, 8 Jurist, 538.

(*z*) Doe *dem.* Williams *v.* Williams, 4
Nev. & M. 263; 2 Ad. & Ell. 381; Da-
vis *dem.* Povey *v.* Doe, 2 W. Bla. 892.

right to be reinstated by entering into a new(a) agreement with the lessor of the plaintiff for possession of the same premises.

66. If the defendant do not appear at the trial and confess lease entry, and ouster, the plaintiff in ejectment will be nonsuited, and the cause of the nonsuit must be specially endorsed on the *postea*, which will entitle the lessor(b) of the plaintiff to mark judgement against the casual ejector. Where several defendants take defence jointly, and some of them do not appear, the trial proceeds against such as appear, and a verdict is entered for such as make default, and an endorsement(c) is made on the *postea*, stating that such verdict was entered for the absent defendants, because they did not appear, which will entitle the lessor of the plaintiff to mark judgement against the casual ejector for the lands in possession of the defendants who made default. Twelve persons having taken defence jointly to an ejectment, without specifying the particular parts which they meant to defend, two of the defendants withdrew their defences at the assizes, and suffered judgement by default, and the other ten defendants having obtained a verdict for ten messuages, of which they were in possession, but which formed only a small part of the property, on a question(d) reserved, the Court directed the verdict to be entered generally for the lessors of the plaintiff, and that the execution should be confined to the premises in possession of the parties who made default, and that the lessors of the plaintiff should have the general costs of the cause, and that the ten defendants should have the costs of defending for the premises to which they proved title.

67. In all cases between landlord and tenant it is enacted by the Statute(e) 1 Geo. IV. c. 87, that wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant, or his attorney, hath been served with due notice(f) of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, and ouster, but the production of the consent rule and undertaking of the defendant shall, in such cases, be sufficient evidence of lease, entry, and ouster: and the judge, before whom such cause shall come on to be tried, shall, when

(a) Lessee Wynne v. Swift, 2 Irish Law Rep. 159.

(b) Bull. N. P. 98; Turner v. Barnaby, 1 Salk. 259.

(c) Bull. N. P. 98; Claxmore v. Searle, 1 Ld. Raym. 729.

(d) Doe dem. Bishton v. Hughes, 2 Cro. M. & Rosc. 281; 4 Tyrw. 957; 4

Dowl. Pr. Ca. 412; Roe dem. Bla Street, 4 Nev. & M. 42.

(e) 1 Geo. IV. c. 87, s. 2, English Irish.

(f) Doe dem. Thompson v. F son, 12 Ad. & Ell. 135; 4 P. & 142; 2 Moo. & Rob. 283, S. C.

endant shall appear on such trial or not, permit the plaintiff on d, after proof of his right to recover possession of the whole, or part, of the premises mentioned in the declaration, to go into e of the *mesne profits* thereof, which shall or might have ac- om the day of the expiration, or determination, of the tenant's in the same, down to the time of the verdict given in the or to some preceding day to be specially mentioned therein :

jury on the trial, finding for the plaintiff, shall, in such case, eir verdict upon the whole matter, both as to the recovery of le, or any part of the premises, and also as to the amount of ages to be paid for such mesne profits; but that nothing contained shall be construed to bar any such landlord from g an action of trespass for the mesne profits which shall accrue e verdict, on the day so specified therein, down to the day of very of possession of the premises recovered in the ejectment: t in all cases in which an undertaking shall have been given urity(*g*) found, if upon the trial a verdict shall pass for the , but it shall appear to the judge before whom the same shall en had, that the finding of the jury was contrary to the evi- or that the damages given were excessive, it shall be lawful for ge to order the execution of the judgement to be stayed abso- till the fifth day of the term then next following, or till the sion, assizes, or Court day (as the case may be); which order ge shall, in all other cases, make upon the requisition of the nt, in case he shall forthwith undertake to find, and on con- rat within four days from the day of the trial, he shall actually urity, by the recognizance of himself and two sufficient sureties reasonable sum as the judge shall direct, conditioned not to any waste, or act in the nature of waste, or other wilful damage ; to sell or carry off any standing crops, hay, straw, or manure, d or made, if any, upon the premises, and which may happen ereupon, from the day on which the verdict shall have been o the day on which execution shall finally be made upon the ent, or the same be set aside, as the case may be.

lessor of the plaintiff has the option, whether a nonsuit(*h*) entered, in case the defendant makes default on the trial, or he shall pursue the remedy given by the preceding Statute : fendant do not appear on the trial, and the statutable provi- all be resorted to, it will be necessary to produce on the trial(*i*)

c. 3.
lams on Ejectment, 380.

(*i*) See the reporter's note to *Uniacke v. Howard, Batty*, 438.

attested copies of the defence, and of the rule for liberty to take defence to the ejectment, and after proving the right of the lessor of the plaintiff to the possession, evidence may be given of the mesne profit which will entitle the plaintiff to a verdict for the whole, or for any part of the premises to which a title is established, and likewise to the mesne profits accruing from the day of the determination of the tenancy, although prior to the day of the demise, until the day of trial, or some preceding period. A similar mode of proceeding for recovery of mesne profits of demised premises may also be adopted where the defendant appears on the trial, but it is not requisite that the notice(*j*) of trial should be proved in either case. However, it is seldom prudent for a landlord to avail himself of this Statute for the recovery of mesne profits, because defence is often taken in the name of an undertenant, who has no means of satisfying the damages and costs, and where the defendant is solvent, and does not appear, the landlord is unwilling to encounter the risk of establishing by strict evidence his right to recover possession, and it may be difficult to ascertain the mesne rates until he gets into actual possession of the property; besides, the landlord can only recover, by means of this Statute, the mesne profits of the premises to the period of the trial, and must have recourse to another proceeding for recovery of mesne rates intermediate between the time of trial and of his getting actual possession.

68. By the Statute(*k*) 1 & 2 Will. IV. c. 31, s. 14, it is enacted that in all cases of trials of ejectments at *Nisi Prius*, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, and ouster, and where(*l*) no bill of exceptions or written objections signed by the defendant's counsel, or no certificate of such counsel that the defendant has a good defence in Equity, shall have been tendered to the judge before whom the cause shall be tried, it shall be lawful for such judge to certify his opinion on the back of the record, that a writ of possession ought to issue immediately: and upon such certificate, a writ of possession may be issued forthwith, and the costs may be taxed, and judgement signed and executed afterwards at the usual time, as if no such writ had issued; but that such writ, instead of reciting a recovery by judgement in the form now in use, shall recite shortly that the cause came on for trial at *Nisi Prius*, at such a time

(*j*) Doe *dem.* Thompson v. Hodgson, 12 Ad. & Ell. 135; 4 P. & Dav. 142; 2 Moo. & Rob. 283, S. C.

(*k*) 1 & 2 Will. IV. c. 31, s. 14, Irish;

11 Geo. IV., and 1 Will. IV. c. 70, s. 38, English.

(*l*) The passage in Italic letters is in the corresponding English Act.

and place, and before such a judge (naming the time, place, and judge), and that thereupon the judge certified his opinion, that a writ of possession ought to issue immediately.

If the plaintiff be nonsuited in consequence of the non-appearance of the defendant to confess lease, entry, and ouster, the judge will not grant a certificate for immediate execution, unless upon affidavits stating the circumstances of the case, and the judge(*m*) has no discretion in regulating the time when the lessor of the plaintiff shall have possession, as the certificate must be granted either for immediate possession, or the cause must be allowed to take its regular course, but if the judge shall think that time ought to be allowed to the defendant, a certificate for immediate execution may be given, on an undertaking(*n*) not to execute it until a certain period. Where an ejectment is brought on two separate demises, and a verdict is entered on one of them for the plaintiff, and on the other for the defendant, reserving leave to move to enter the verdict on the second demise for the plaintiff: immediate execution being granted to the plaintiff on the first demise, it was ruled, that although possession(*o*) had been delivered accordingly, the lessor of the plaintiff was not precluded from applying to enter up judgement in his favour on the second demise pursuant to the leave reserved. It was a subject of doubt whether this Statute extended to ejectments(*p*) for non-payment of rent, for if so construed, the time allowed for redeeming the premises would be abridged, but it was afterwards held, that if a proper case(*q*) were made, a certificate for immediate execution should be granted.

69. In an undefended ejectment, the lessor of the plaintiff has no other remedy for recovery of his costs, than an action of trespass for the mesne profits: if defence be taken, and the defendant make default on the trial, and judgement(*r*) be entered against the casual ejector, an attachment may be issued against the defendant for non-payment of the costs: the mode of proceeding in the Exchequer to enforce payment of costs against a defendant, who makes default on the trial, is to procure an order "that judgement shall be entered against the casual ejector, and that the proper officer shall tax the usual costs of the ac-

(*m*) Doe *dem.* Williamson *v.* Dawson, 4 Carr. & P. 589.

(*n*) Doe *dem.* Packer *v.* Hilliard, 5 Carr. & P. 132.

(*o*) Doe *dem.* Bank of England *v.* Chambers, 4 Ad. & Ell. 410; 6 Nev. & M. 539.

(*p*) Lessee Beresford *v.* Shiel, 3 Law

Rec. 109, 2nd ser.; Lessee Brabazon *v.* Fleming, 3 Law Rec. 109, 2nd ser.; Lessee Davis *v.* Jackson, Cr. & Dix, Abr. Notes, 50.

(*q*) Lessee Bristow *v.* Lipsitt, 4 Law Rec. 151, 2nd ser.; Lessee Jaffray *v.* Brangan, Armst. M. & O. 202.

(*r*) Turner *v.* Barnaby, 1 Salk. 259.

tion against the defendant, and on his refusal to pay, that an attachment shall issue against him." A copy of this order(s) must be served on the defendant, along with a copy of the taxed costs, and payment must be demanded from the defendant personally, either by the plaintiff in person, or under a letter of attorney executed by the plaintiff for that purpose, and upon an affidavit of such demand and refusal an attachment will be granted. According to the practice of the courts, a copy of the taxed costs is to be served, and payment(t) demanded, either by the plaintiff in person, or under his letter of attorney, and an attachment is issued upon an affidavit of such demand and refusal; but it is requisite that the demand(u) should be received. If the lessor of the plaintiff proceed under the Statute(v) for recovery of the mesne profits, he will be entitled to issue execution for his damages and costs, although the defendant did not appear on trial of the cause.

70. Upon a verdict and judgement against the defendant, execution will be granted against his person or his goods for the taxed costs together with a writ of *habere* commanding the sheriff to restore possession to the plaintiff. The execution for costs and the writ for possession may be issued separately, or may be included in the same writ: if the lessor of the plaintiff be apprehensive of waste or injury to the premises, or that the crops may be improperly removed, he may, in ordinary cases(w), immediately after making his judgement, issue a writ of possession, without waiting to have his costs taxed or ascertained, but such a proceeding will be a relinquishment or waiver of the costs of the cause. Where several persons defend jointly, some of whom appear on the trial, and others make default, and a verdict is found against such of them as appear, each of the defendants will be answerable(x) for the whole costs, which may be taxed against any or all of them at the same time: upon the *postea* against such as have appeared, and upon the rule for liberty to defend against such as have made default; but if the amount be levied from one defendant, the Court will interfere, to prevent any proceeding against another for the same costs.

(s) 1 Stew. Pr. Forms, 206.

(t) Doe *dem.* Barton *v.* Quin, 1 Huds. & Br. 40.

(u) Lessee M'Cary *v.* Donnelly, 3 Law Rec. 140, 2nd ser.

(v) 1 Geo. IV. c. 87, s. 2, English and

Irish.

(w) Doe *dem.* Messiter *v.* Dynel. Taunt. 289; Betts *dem.* Robson *v.* Egerton, Barnes, 212.

(x) Thrustout *dem.* Wilson *v.* Wilson, Bull. N. P. 335; Barnes, 149.

71. If the lessor of the plaintiff obtain judgement in ejectment, the real defendant, though not a party to the record(*y*), will, on a summary application, be compelled to pay the costs of the cause. The reason of this practice is, that in all ejectments, the original defendant, or casual ejector, is merely a nominal party, and some steps must be taken to place a real defendant on the record, but the Court(*z*) expect, and require that the real person who defends the suit shall be made a party, and if an undertenant be placed as defendant on the record, the Court are led to believe he is the real and *bonâ fide* party: if, then, a landlord, instead of using his own name, suffer his tenant's name to appear as the sole defendant, he is practising a deception, and when the Court find the real state of the facts, and that the landlord has really defended the action, he shall be put in the same situation in which he was bound, in the first instance, to have placed himself, and shall be compelled to pay the costs awarded to the lessor of the plaintiff. However, where an insolvent person was induced to defend an ejectment by a third person, who claimed no interest(*a*) in the property, but employed the attorney, and supplied money to carry on the defence, the Court refused to compel such third person to pay the costs of the lessor of the plaintiff.

72. Where a verdict is found for the defendant, or the plaintiff is nonsuited after the defendant has appeared on the trial, the defendant may recover his costs by attachment against the lessor(*b*) of the plaintiff, if an unprivileged person, or by sequestration, against the goods of a peer or member of parliament: the lessor of the plaintiff may pay the costs to any one(*c*) of the successful defendants who defend jointly, he thinks fit, but each of the defendants, under a consolidation rule, is entitled to his own separate costs. A defendant may enforce payment of his taxed costs against any lessor of the plaintiff he may select, but where a person is named one of the lessors of the plaintiff, without his knowledge, and the suit is carried on(*d*) without his privity, the remedy for the costs lies against the attorney using the name of the party without his permission: and the Common Pleas held, that the attor-

(*y*) Doe *dem.* Masters *v.* Gray, 10 B. & Cress. 615; Thrustout *dem.* Jones *v.* Nixon, 10 B. & Cr. 112; Thrustout *dem.* Jones *v.* Shenton, 10 B. & Cress. 110; 5 Mann. & Ry. 443.

(*z*) Lloyd *v.* Evans, 1 Willm. W. & D. 50, by Patteson, J.; and see Ball *v.* Ross, 1 M. & Gr. 445; 1 Scott's N. R. 217; Hearsey *v.* Pechell, 5 Bing. N. C.

466; 7 Scott, 477; 7 Dowl. P. C. 437.

(*a*) Doe *dem.* Wright *v.* Smith, 8 Dowl. Pr. Ca. 517.

(*b*) Doe *dem.* Prior *v.* Salter, 3 Taunt. 485.

(*c*) Jordan *v.* Harper, 1 Stra. 516.

(*d*) Lessee Odell *v.* Odell, 1 Jones, 80; Doe *dem.* Keon *v.* Keon, Jebb & B. 194.

ney who brought the ejectment was answerable for the whole costs of the cause to a successful defendant, though the original attorney had been removed, and the ejectment was prosecuted by successive solvent attorneys. Where the plaintiff's attorney dies after verdict, rule to elect an attorney should be served on the lessor of the plaintiff before taking any proceeding(*f*) on behalf of a defendant for recovery of costs.

73. The *habere*, or writ of possession, is always directed to the sheriff of the county where the lands lie, and, after reciting the judgment commands him, without delay to cause the plaintiff to have the possession of his term in the premises recovered in the ejectment: the undersheriff either grants his special warrant to the party, or his agent, getting an indemnity; or authorizes his bailiffs to deliver possession and it is the claimant's duty to send a proper person(*g*) to point out the lands of which possession is required, and if a greater quantity(*h*) of land be taken than was recovered, the Court will, on a summary application, award restitution. The sheriff is bound to deliver actual possession, and is armed with all necessary authority for that purpose, and may break open the outer door(*i*) of a dwelling-house, or other building, in order to execute the writ, if entrance be denied. Where several messuages, in possession of different persons, are recovered, the sheriff ought to remove the occupiers from every house on the land; and he, or the persons acting under his authority, be disturbed(*j*) in executing the writ, the Court, on affidavit of the facts, will grant an attachment against any person guilty of such misconduct. If the sheriff only deliver possession of part of the premises recovered, a new writ of possession(*k*) will be issued for the residue: the execution of the writ cannot be considered complete until the sheriff, or his bailiffs, have quitted the premises, after delivering actual possession to the claimant and if persons remain concealed(*l*) in a dwelling-house for the purpose of keeping possession, and after the sheriff has quitted, forcibly hold possession, the writ of *habere* will be renewed, if not returned, as the delivery of possession was not fully accomplished.

(*e*) Lessee *Ld. Trimlestown v. Kemmis*, 5 Irish Law Rep. 432.

(*f*) *Doe dem. Lawless v. Walsh*, Longf. & T. 228.

(*g*) *Crocker v. Fothergill*, 2 B. & Ald. 660, by Bayley, J.

(*h*) *Roe dem. Saul v. Dawson*, 3 Wils. 49; *Cottingham v. King*, 1 Burr. 629; *Lessee Wynne v. Swift*, 2 Irish

Law Rep. 159.

(*i*) *Semayne's case*, 5 Rep. 91, B.

(*j*) *Kingsdale v. Mann*, 6 Mod. 271 Salk. 321; Holt. 154.

(*k*) *Devereux v. Underhill*, 2 Kel. 245.

(*l*) *Upton v. Wells*, 1 Leon. 145 *Brown v. Evisam*, cited Latch. 165 *Style's case*, 2 Brownl. 216.

Although a writ of *habere* be defectively executed, the party may accept the sheriff's return, and act on it as a complete delivery of possession, provided the conduct of the lessor of the plaintiff was *bond fide* and free from fraud in the transaction. Upon the execution of a writ of *habere*, under an ejectment for non-payment of rent, the sheriff turned every person out of possession, except the wife(*m*) of an undertenant, who was lying sick in bed, and requested, as an indulgence, to be suffered to remain until the following day, and the sheriff made his return to the writ, that he delivered the possession on the same day, being the 18th of July: the Court of Exchequer, on a bill filed by the tenant for redemption, held there had been a complete execution of the writ of possession on the 18th of July, and that the time for redemption commenced running from that day, though the undertenant's wife was suffered to continue in the house until the following day.

74. Lord Coke(*n*) observes, that wherever a person recovered the seisin, or possession of land, and the tenant or defendant afterwards disseised, or ejected him, this was a contempt at the common law, because it is done against the judgement of the Court, and in despite of the law, for which the offender may be committed as "*interest reipublicæ ut judicia rata sint: et ea quæ in curiâ nostrâ rite acta sunt, debitæ executioni demandari debent.*"

Where the lessor of the plaintiff, or his agents, are forcibly turned out of possession by a person who was served with the ejectment, either(*o*) immediately, or very shortly after the execution of the *habere*, and before its return, a renewal may be obtained, but after the writ had been fully executed, although the defendant retook possession, the Court formerly declined to interfere. A writ of possession being executed on the 22nd of February, 1806, the defendant on the 10th of October, 1807, forcibly entered the house and continued in possession; and it was ruled that possession having been given under the writ, it should have been returned by the sheriff, and that the plaintiff could not afterwards have obtained another writ(*p*), for otherwise he might retain the right of suing out a new *habere*, as a remedy for any trespass the defendant might commit within twenty years after the judgement. Although a new writ of possession will not be granted, where, from the time elapsed, or from other circumstances, it might rea-

(*m*) *Bodkin v. Vesey*, 1 Jones's Exch. Rep. 139-151.

(*n*) 2 Instit. 83.

(*o*) *Rex v. Harris*, 1 Ld. Raym. 482; *Goodright v. Hart*, 2 Stra. 831; *Molyneux v. Fulgam*, Palm. 289; *Pierson v.*

Taverner, 1 Ro. Rep. 353; *Gallop's case*, 2 Brownl. 253; *Ratcliffe v. Tate*, 1 Keb. 779.

(*p*) *Doe dem. Pate v. Roe*, 1 Taunt. 55; *Lessee Mahon v. Ejector*, 3 Irish Law Rep. 345.

sonably be supposed that the rights of the parties had been violated, the Court will not suffer their process to be trifled with, or unavailing. An *elegit* creditor having executed his writ of possession and after being about three weeks in occupation of the premises, the cattle were driven off(*q*) by about fifty persons, who alleged to have acted by the defendant's directions; and the lessor of the plaintiff subsequently maintained a struggle with the defendant for possession until the following Trinity Term, when, upon affidavit of the plaintiff, an order was made that the *habere* should be renewed, as there was no ground for presuming that any thing had occurred in the interim to alter the rights of the parties. Where a writ of *habere* has been executed and returned, and the evicted tenant forcibly, or improperly, gains possession, a writ of restitution(*r*) will be issued to the party who was dispossessed.

75. The sheriff having delivered possession of a farm, with the crops(*s*), which had been recently severed, and were lying on the ground, under a writ of possession issued on an ejectment against an overholding tenant, the Court refused to order the plaintiff to pay over the value of the crops to the defendant after deducting the rent in arrear, because the crops were cut off frequently to the determination of the tenant's interest. Growing crops pass to the landlord by the execution of a writ of *habere*, though the crops were previously(*t*) seized under an execution against the goods, provided the day of the demise laid in the ejectment precedes the issuing of such execution, because the tenant being a tenant from the day of the demise, the growing crops cannot be considered as his property after that period.

76. After the delivery of a writ of possession, the sheriff informed the plaintiff that the landlord intended applying to set aside the proceedings in the ejectment for irregularity, in consequence of which he suspended the execution(*u*) of the writ; and the proceedings were afterwards set aside, not for any irregularity, but as a matter of indulgence to the plaintiff in payment of costs. The lessor of the plaintiff having incurred expense in trying to have the writ executed, it was ruled he was

(*q*) Lessee Linehan v. Anthony, Batty, 453; Lessee Massey v. Ejector, 1 Jones's Exch. Rep. 557; Loveland dem. Carroll v. Thrustout, Smythe's Rep. 236; Lessee Lee v. Ejector, 5 Irish Law Rep. 172; Lessee Graydon v. Ejector, 5 Irish Law Rep. 436; Doe dem. Lloyd v. Roe, 2 Dowl. Pr. Ca. 407, N. S.

(*r*) Doe dem. Pitcher v. Roe Pr. Ca. 971.

(*s*) Doe dem. Upton v. Wi 3 Bing. 11; 10 Moore, 267.

(*t*) Hodgson v. Gascoigne, Ald. 88.

(*u*) Mason v. Paynter, 1 Q. 974; 1 Gale & Dav. 381.

to recover such expenses in an action against the sheriff for delaying to execute the writ: and it has been ruled that^(v) the venue in an action of this nature against the sheriff for nonfeasance, is transitory.

77. It often becomes a matter of considerable importance that a landlord should be enabled to obtain possession of a house or lands on the determination of a demise, without being obliged to have recourse to the vexation and expense attending an ejectment: this object is particularly desirable in cases of ejectment for non-payment of rent, when the evicted premises are demised to undertenants or occupiers during the period allowed for redemption. Various means have been resorted to for this purpose, but the most summary and effectual procedure is by means of a warrant of attorney executed by the tenant contemporaneously with the demise, authorizing the landlord to mark judgement in ejectment, and issue execution upon the determination of the holding. Upon motion for leave to enter up judgement on an old warrant of attorney, it appeared that the warrant was signed by the defendant, who was tenant from year to year to the lessor of the plaintiff, and the instrument^(w) stated the particulars of the tenancy, and empowered the lessor to mark judgement in ejectment, and issue execution upon the determination of the holding by notice to quit: the affidavit on which the motion was grounded stated that a notice to quit, dated the 31st of July, 1842, had been served upon the tenant on the first of August, 1842, to give up possession of the land on the 1st of February ensuing, and of certain buildings on the 1st of May, and that the tenant had given up possession of the land but refused to quit the buildings; Coleridge, Justice, observed, that if a party entered into such an agreement, he saw no reason why it should not be enforced.

^(v) Abbott v. Ld. Ennismore, 2 Jones, 391.

^(w) Doe *dem.* Beaumont v. Beaumont,

2 Dowl. Pr. Ca. 972, N. S.; and see Kavanagh v. Gudge, 8 Jurist, 362.

CHAPTER VII.

FORFEITURE.

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|---|---|
| 1. <i>Ejectment for a Forfeiture at common Law.</i> | 9. <i>Necessity of Demand compensated with.</i> |
| 2. <i>The Rent in Arrear must be formally demanded.</i> | 10. <i>In respect of what Estate may be made.</i> |
| 3. <i>In what Manner the Demand of Rent must be made.</i> | 11. <i>What Estate defeated by Condition broken.</i> |
| 4. <i>When Demand required in other Cases.</i> | 12. <i>Evidence in Case of Re-entry not insuring.</i> |
| 5. <i>At what Place the Rent must be demanded.</i> | 13. <i>Waiver of Forfeiture.</i> |
| 6. <i>At what Time.</i> | 14. <i>Relief against Forfeiture</i> |
| 7. <i>What Sum must be demanded.</i> | 15. <i>Writ of cessavit.</i> |
| 8. <i>Reservation of Re-entry in Case of insufficient Distress.</i> | 16. <i>Relief in Equity against Forfeiture.</i> |

1. A LANDLORD may be entitled, by the stipulations of a lease, to recover possession of the demised premises, previous to the expiration of the demise, by means of a clause or proviso in the lease, enabling him to re-enter for non-payment of the rent, or for the breach of any express covenant. Conditions of re-entry have always been strictly construed, with a view of preventing a forfeiture of the tenant's interest, and being considered contrary to public policy, they were treated as penalties, and not as means provided for the secure payment of the rent, or the observance of the covenants of the lease. The remedies by distress, and by action of debt, were preserved, whilst every difficulty was imposed on a landlord, who sought to defeat his tenant's estate for non-payment of rent, and even in modern times, where Courts of Equity interposed to relieve tenants from forfeiture incurred by non-payment of rent, upon the supposed ground that adequate compensation could be made to the landlord for the delay of payment, the doctrine of extending equitable relief to a landlord has been found too firmly established to admit of any relaxation in favour of the landlord's favour. If a lease contain a clause, giving to the landlord, his heirs or assigns, a right of re-entry for non-payment of rent, or the non-observance of any of the covenants, the landlord, upon the breach of the condition, may recover possession of the premises, discontinue the lease: an actual entry upon the land^(a) was formerly a

(a) Little v. Heaton, 2 Ld. Raym. 750; 1 Salk. 259; Oates dem. Wigfall

v. Brydon, 3 Burr. 1895; Good v. Hare v. Cator, 2 Doug. 485.

necessary for that purpose, but the service of an ejectment is now deemed sufficient.

Where a party enters into possession of a farm, and pays rent under an executory agreement for a lease for years, by which it was stipulated that such future lease should contain, amongst others, a covenant against taking successive crops of corn, with a condition of re-entry in case of its nonperformance: the Court ruled(*b*) that the tenant in possession, under such a contract, holds upon the terms of the intended lease, and that the stipulation and proviso apply to the yearly tenancy of the party, and that the demised premises may be recovered by ejectment for the forfeiture.

Where an ejectment is brought upon a clause of re-entry for non-observance of covenants in a lease, in order to prevent surprise, the Court(*c*) will stay the proceedings until the lessor of the plaintiff furnish a particular of the breaches on which he means to rely.

2. Many formalities are required, by the common law, to be observed, for the purpose of entitling a landlord to re-enter and defeat the tenant's estate for breach of a condition for non-payment of rent. Where a right of re-entry for non-payment of rent is claimed, in destruction of the estate of the terre-tenant, it is requisite that a demand of the rent(*d*) in arrear shall be made, before an ejectment can be sustained, unless, by the express terms of the condition(*e*), any demand shall be rendered unnecessary: but if a rent-charge be granted, with power to the grantee, in case the rent shall be in arrear for a certain space of time, to enter upon the lands charged, and receive the rents and profits until satisfaction of all arrears, the grantee(*f*), upon the rent-charge becoming in arrear, may recover in ejectment against the terre-tenant, without any proof of previous demand of the rent, because the necessity of making a demand is confined to cases in which it is sought to obtain possession of the land by way of forfeiture, and not where the lessor of the plaintiff only seeks to take the profits for a temporary object.

3. The rent may be demanded by the landlord in person, or by his

(*b*) Doe *dem.* Thomson *v.* Amey, 12 Ad. & Ell. 476; 4 P. & Dav. 177.

(*c*) Doe *dem.* Birch *v.* Phillips, 6 T. R. 597.

(*d*) Doe *dem.* Forster *v.* Wandlass, 7 T. R. 117; Maund's case, 7 Rep. 28, B.; Co. Litt. 201, B. Bro. Abr. De-maund. pl. 19; Umphery *v.* Damyon, 1 Bulstr. 181.

(*e*) Dormer's case, 5 Rep. 40, B.;

Perryman *v.* Bowden, Hetley, 59; Good-right *dem.* Hare *v.* Cator, 2 Doug. 486; Doe *dem.* Harris *v.* Masters, 2 B. & Cr. 491; 4 D. & Ry. 45; Lessee Warrington *v.* Hodgins, Batty, 311.

(*f*) Doe *dem.* Biass *v.* Horsley, 1 Ad. & Ell. 766; 3 Nev. & M. 567; Pierson *v.* Sorrell, 2 Show. 185; Anon. 3 Dyer, 348.

agent or bailiff furnished with an authority(*g*) in writing for that purpose, who should notify it to the tenant, and produce the authority, required. It has been held, however, that a verbal authority(*h*) demand rent and make a re-entry is sufficient; but a bailiff cannot, virtue of his general authority to receive rents, make a demand of rent which accrued due(*i*) after the authority was given, because it is a right attached, and a special authority must be given in order to re-
the estate: a person constituted bailiff to enter and demand rent under a clause of re-entry for a forfeiture, must demand(*j*) such rent in his own proper person, and cannot appoint or substitute any other individual for that purpose. The demand will not be invalidated by being made upon a stranger, as it need not be made upon the tenants of the lands personally(*k*), nor is it essential there should be any person on the premises at the time of making the demand, except the person to whom it is made: an assignee of the reversion, however, cannot make an effectual demand of the rent, unless the tenant has received notice of the assignment prior to the rent having become due. The demand must be peremptory, such as(*m*), "on behalf of J. S., the landlord of these premises, and by his authority in writing, I demand a sum of £50, to be paid to me for half a year's rent, due and payable to him out of the lands of Lismote, on this 29th day of September, and I am ready, if required, to produce his authority for that purpose:" but a demand(*n*) in the following form has been held insufficient, "bear witness, we are come hither to demand and receive, &c."

4. The common law doctrine of demand is chiefly applicable to breaches of conditions for non-payment of rent or other specified sum of money reserved by lease, but by express stipulation contained in a condition for breach of any other description of covenant, such demand may be rendered necessary, and must be strictly observed. A house was demised for eighty years, subject to a condition(*o*), that if the

(*g*) *Roe dem. West v. Davis*, 7 East, 364; *Knapp v. Welch*, 1 Brownl. 138.

(*h*) *Wood v. Chivers*, 4 Leon. 179; *Kidwelly v. Brand*, Plowd. 70; *Sir John Souch's case*, Cro. El. 22; but see same case differently reported, Moor. 141; *The Queen v. Littleton*, 3 Leon. 223.

(*i*) *Dixon v. Smalley*, Skinn. 413; Holt, 77, S. C.; *Smith v. Birmingham Gas Company*, 1 Ad. & Ell. 530; by Taunt. J.; *Ayer v. Orme*, 2 Dyer, 221, B.; *Dalis*, 53, case 31; *Eire's case*, Moor, 52, S. C.; *Knapp v. Welch*, 1

Bro. 138.

(*j*) *Wood v. Chivers*, 4 Leon. 179.

(*k*) *Umphery v. Damyon*, 1 Bulstr. 181; *Stretton v. Cush*, 1 Bro. 135; Cro. Jac. 9; Yelv. 36, S. C.

(*l*) *Doe dem. Brook v. Brydges*, 2 D. & Ryl. 29.

(*m*) See the form in 1 Chitty's Practice of the Law, 481.

(*n*) *Knapp v. Welch*, 1 Bro. 138.

(*o*) *Stretton v. Cush*, 1 Bro. & G. 135; Cro. Jac. 9; Yelv. 36; *Owen*, 114; Moor, 680, case 932.

executors or assigns did not repair, within six months after the lease should be void: the lessee underlet for ten years the house being in a state of decay, the assignee of the reversion to the undertenant, then in possession, to repair, which was done in six months, upon an ejectment for the forfeiture, the court held insufficient, because the notice of want of repairs was unnecessary, to be given at the house, but should have been given orally to the immediate lessee, who had the principal interest, and not solely to the undertenant, as such a condition collateral to the land, and merely personal.

Rent ought to be demanded(*p*) upon the demised premises the land, as Lord Coke observes, is the debtor, and the place of demand appointed by law, but if the reserved rent is payable at any particular(*q*) place off the land, such as a tomb in Christ Church, Dublin, a demand must be openly made at the stipulated place, and need not be made upon the land. Rent must be demanded at the most notorious place on the demises, and if there be a dwelling-house on the land, the demand must be at the front door(*r*), though it is not necessary to enter the house, even if the outer door should be open, nor is it requisite(*s*) that any person should be present, except a witness for the purpose of proving the fact of demand, nor should the demand(*t*) be addressed to any individual, as a general demand of the rent *upon the land*, without being made to any person, is good, though if it be made upon under-tenants in possession, or strangers to the lessors, *upon the land*, it will be good. However, if the rent be reserved payable(*u*) at the dwelling-house, no demand is necessary.

If the rent be reserved payable at a specified place off the land, as at a tomb, a demand must be made(*v*) at the appointed place, and the formality of making the demand must be strictly observed, and some person should attend on behalf of the tenant, and such demand should be made, in presence of witnesses competent to prove

. 201, B.; 211, A.; Duppa v. [unclear], 1 Bro. & G. 287, note 16.
 [unclear]'s case, 4 Rep. 72, A.; Taylor, Cro. Eliz. 462; Moor. 404.
 v. Mayo, 1 Saund. 287, Litt. 201, B.; but see [unclear] v. [unclear], 15.
 1 Bro. 428, Rent, K.
 . Brook v. Brydges, 2 D.

& Ry. 29; Anon. Cro. Eliz. 15; but see Stretton v. Cush, 1 Bro. & G. 135.
 (*u*) Rede v. Farr, 6 M. & Selw. 121; but see Elyot v. Nutcombe, 3 Leon. 4; 1 Anders. 27, case 63; Benl. & Dal. 59; Dean & Ch. of Gloucester's case, 3 Dyer, 329, A.
 (*v*) Ventris v. Farmer, 1 Bro. & G. 96; 1 Ro. Abr. 459, Condition, Z., pl. 2; Buskin v. Edmunds, Cro. Eliz. 415.

the fact, at a convenient hour before sunset, and the person making should remain on the spot until after sunset. It is not sufficient to demand the rent from the tenant personally off the land, as it is presumed he is only prepared to pay the amount either upon the premise or at the place specified in the condition. The dean and chapter of Chichester having demised lands rendering rent payable at the Cathedral church, subject to a clause of re-entry in case of non-payment, it was ruled(*w*), that in order to work a forfeiture, a formal demand of the rent should be made in the cathedral, though not situated on the demised premises, and should be made in that part of the church, where there was the greatest coming and going at the setting of the sun, and it was said by Popham, C. J., that the person whilst making the demand ought to stand still, because the law did not admit of walking demands. Where the rent was demanded at a house on the premises an hour before sunset, and the person who made the demand then quitted the house, and walked in a lane which was part of the premises until after sunset(*x*), when he returned to the house and repeated the demand; the Court held that the walking in the lane was not a continuance of the demand, which was, therefore, invalid.

6. The demand must be made precisely(*y*) on the day when the rent becomes payable, and at a convenient time before the setting of the sun on that day, so as to allow reasonable time(*z*) to count the money, and the person making such demand(*a*) must continue on the premises until sunset: the demand must not only state the amount of the rent(*b*) claimed, but must specify for what time, and when it became due(*c*), and must be actually made, whether any person be present or not; if the condition in a lease stipulate, that in case the rent be behind for the space of thirty days after the gale-day, the lessor may re-enter; in order to cause a forfeiture, the demand must be made(*d*) on the thirtieth day; and in such case if the rent be reserved on the 25th of March, the demand must be made before sunset on the 24th of April.

By a grant of lands in fee-farm at the yearly rent of £93 19s. 3d,

(*w*) *Knapp v. Welch*, 1 Bro. & G. 138; 2 Ro. Abr. 428, Rent, L.

(*x*) *Wood v. Chivers*, 4 Leon. 179; *Floide v. Chivers*, Dal. 86, S. C.

(*y*) Co. Litt. 202, A.

(*z*) *Fabian v. Winston*, Sav. 121; *Thomson v. Field*, Cro. Jac. 499.

(*a*) *Potter v. Foster*, 3 Bulst. 296.

(*b*) *Fabian v. Windsor*, 1 Leon. 305; Sav. 121; Cro. Eliz. 209; Anders. 252;

Butle v. Wilford, Dalis. 114.

(*c*) *Jack dem. West v. Hogan*, Arnst. M. & O., N. P. C. 232; *Doe dem. Wheeldon v. Paul*, 3 Carr. & P. 613; Co. Litt. 201, B.

(*d*) *Doe dem. Lawrence v. Shawcross*, 3 B. & Cr. 152; 5 D. & Ry. 711; *Doe dem. Edwards v. Leach*, 3 M. & Gr. 229; 3 Sc. N. R. 509.

payable half-yearly on the first day of May and first day of November in every year, it was provided, that if the rent should be behind and unpaid for the space of twenty-one days next after any of the days on which it was made payable, it should be lawful for the lessor, his heirs and assigns, to enter and distrain, and in case of no sufficient distress to satisfy the rent in arrear, then it should be lawful for the lessor, his heirs and assigns, to re-enter into the demised premises and have the same again as in his or their former estate: the rent was demanded upon the premises on the 1st day of May, and afterwards on Sunday, the 22nd day of May, at eight o'clock in the afternoon, and it was proved there was then no sufficient(*e*) distress on the premises; upon the trial of an ejectment for the forfeiture, in which the day of the demise was laid on the 23rd of May, the Exchequer held that the rent was demandable, and was properly demanded on Sunday, the 22nd of May, and as no sufficient distress was to be found on the premises on that day, it might reasonably be inferred there was no adequate distress on the following day. In like manner, a proviso enabling the landlord to re-enter in case the rent(*f*) should be unpaid on any day, on which it should be due, or within ten days after, does not authorize a re-entry until ten days have elapsed after a gale's rent has become due. A material difference exists between the reservation of a rent payable on a particular day(*g*), or within a certain time afterwards; and the reservation of rent payable at a certain day, with a condition, that if it be behind by the space of any given time, the lessor might re-enter. In both instances, a tender of the rent, either on the first or last day of payment, or any of the intermediate days, to the lessor himself, either upon or off the land, is good, but in the former case it will be sufficient if the lessee attend on the first day of payment at the proper place, and if the lessor do not attend, the condition is saved, whilst in the latter case, it will not be sufficient that the lessee should attend on the first day of payment, as he is equally bound to attend on the last day of payment in order to save the lease.

7. The demand must be made of the precise(*h*) sum due for rent, and not of a penny more or less, for as Lord Coke(*i*) observes, "when one doth demand a rent upon a condition, he ought to be sure, as it

(*e*) Lessee Cowan v. Chambers, Hayes, 544.

(*f*) Kavanagh v. Gudge, 6 Scott's N. R. 508.

(*g*) William Clun's case, 10 Rep. 129, A.; Clun v. Fisher, Cro. Jac. 309; Cropp v. Hambleton, Cro. Eliz. 42;

Moor. 223; 2 Leon. 130; Godb. 38; Butler's note 88 to Co. Litt. 202, A.; Hudson's Comm. 427.

(*h*) Fabian v. Windsor, 1 Leon. 305; Cro. Eliz. 209; Sav. 121; Anders. 252.

(*i*) Moodie v. Garnance, 3 Bulstr. 153.

were, *to hit the bird in the eye*, and to demand the just sum, or not re-enter, because conditions are odious in the law, and are, therefore, be taken strictly." A single gale of rent can only form the subject of a demand, for the purpose of causing a forfeiture, for if the rent be reserved payable at Michaelmas and Lady-day, and the rent payable at Lady-day be not then demanded, the whole year's rent cannot be demanded at the ensuing Michaelmas, because then, as was said, the lessor might leave his rent in the tenant's hands, until it amounted to a large sum of money, and make his demand when the lessee(*k*) was not prepared to pay the whole amount. If, however, the tenant proved that he attended at the proper time and place to pay his rent, and was provided(*l*) with adequate funds for the purpose, and that no person attended on the landlord's part to receive the money, the forfeiture will be saved, although a formal demand was rendered unnecessary by the express stipulations of the lease.

8. In many leases the right of re-entry is reserved in case the rent shall be in arrear for twenty-one days after the specified days of payment, and in case there shall be no sufficient distress upon the demised premises. A similar clause has been introduced into the Irish Statute(*m*) 11 Anne, c. 2, which gives the ejectment for non-payment of rent where no sufficient distress is to be found on the premises, and this stipulation seems to be founded on the Statute(*n*) of Gloucester giving the writ of *cessavit*, if no distress could be found. In the decisions upon this writ, it has been held that if the lands be enclosed so that the distress(*o*) cannot be taken and removed, such distress will be insufficient to prevent a forfeiture: so where a feoffment in fee was made reserving rent, upon condition that if the rent should be in arrear, and no distress found upon the premises, the grantor might re-enter; and there being no distress except in a cupboard, which was locked, so that the grantor could not come at its contents, this was held a forfeiture, for where the place is not open to distress, it is the same as if there were no distress upon the premises. In an ejectment on a similar condition of re-entry, it was ruled(*q*) that as the bailiff

(*j*) Doe *dem.* Wheeldon *v.* Paul, 3 Carr. & P. 613; Scott *v.* Scott, Cro. El. 73; 2 Leon. 128; 3 Leon. 225; 4 Leon. 70, S. C.; Butle *v.* Wilford, Dalis. 114; Anon. Aleyn. 94.

(*k*) Scott *v.* Scott, 2 Leon. 226.

(*l*) Bac. Abr. Conditions (O. 2); Gilb. Rents, 80; Com. Dig. Conditions, (L. 5); Furser *v.* Prowd, Cro. Jac. 423.

(*m*) 11 Anne, c. 2, Irish; 4 Geo. II. c. 28, English.

(*n*) 6 Edw. I. c. 4, Eng. & Irish.

(*o*) Bro. Abr. fo. 124, pl. 24, title *Cessavit*; 2 Instit. 296.

(*p*) 1 Ro. Abr. 428, Condition, T. pl. 3; Huds. Comm. 473.

(*q*) Rees *dem.* Powell *v.* King, Forest, 19; Hoodie *v.* Winscomb, Godb. 110.

had neglected to search a cottage, which formed a principal part of the premises, for a distress, the lease was not forfeited; and where the outer door was locked, so as to prevent access for the purpose of distraining without committing a trespass, it was held by (r) Lord Tenterden that a distress which was not available must be considered insufficient.

Although there are growing crops on the premises at the time of searching for distrainable chattels, it is not compulsory (s) on the landlord to seize them, and he may enter for the condition broken, and insist on the forfeiture, even if such crops, when ripe, would be sufficient to satisfy the arrear of rent. In an ejectment founded on a condition of re-entry, in case of no sufficient distress, it appeared in evidence that half a year's rent became due on the 25th of March, and the demise in the ejectment being laid on the 2nd of May, a search was made on the 1st of May, and no sufficient distress being then found, it was decided (t) that if the landlord cannot find any sufficient distress on the premises after the rent becomes due, and before service of the ejectment, and the rent be not paid within the time allowed by the condition for that purpose, a right of re-entry accrues to the landlord, or, at least, renders it necessary for the defendant to shew there was sufficient distress within the terms of the proviso. It is to be collected from the preceding decision, that the want of sufficient distress upon any day (u) after the rent falls due, affords ground for presuming there was no adequate distress upon the premises to satisfy the rent in arrear during the interval between the rent-day and the service of the ejectment, unless the tenant proves the contrary. Upon a lease for years, subject to a condition that if the reserved rent were behind at the day, and for ten days after, and no distress to be found upon the land, the lessor might re-enter, and the rent being in arrear, it appeared there was sufficient distress on the premises until three o'clock in the afternoon of the tenth day, when the lessee removed his cattle; and at the last hour of the tenth day, when (v) the rent was demanded, there was no distress on the land: an ejectment being brought for the forfeiture, the Court held that if adequate distress

(r) *Doe dem. Chippendale v. Dyson*, Moo. & Malk. 77.

(s) *Loveland dem. Tuthill v. Molony*, Huds. Comm. 474, in the note; *Lessee Warrington v. Hodgins*, Batty, 330, note; Huds. Comm. 479, note; *Canny v. Hodgins*, Hayes & Jones, 769.

(t) *Doe dem. Smelt v. Fuchau*, 15 East, 286; *Lessee Cowan v. Chambers*, Hayes, 544.

(u) Huds. Comm. 480.

(v) *Worcester v. Stone*, Cro. Eliz. 63.

were to be found at any time within the ten days, the condition not broken.

9. A condition of re-entry may be framed so as to dispense with the necessity of making any formal demand of the rent: where a lease contains a proviso that if the rent be in arrear for twenty-one days the lessor may re-enter, although the rent be not demanded, ejectment lies for a forfeiture incurred by such non-payment without any previous demand. Conditions of re-entry inserted in leases ought not to be made to depend on the inadequacy of the rent on demised premises, and should, by express stipulation, render a formal demand of the rent unnecessary.

10. Upon a conveyance by lessee holding for lives or for years, or upon an assignment of his whole estate, or upon the surrender of a lease by lessee co-extensive with his own interest, or upon the reversion being rendered by lessee of his term in demised premises, reserving a rent, with condition of re-entry, in case of non-payment, or upon a conveyance of lands in fee-farm, rendering rent with a similar condition, the grantor may enter and avoid the grant, or surrender for breach of the condition, although no reversion has been retained: but if the grantor assign all his estate in the premises, the assignee cannot take advantage of the condition, because a reversion must be transferred in order to enable the party to avail himself of the Statute, and so that the grantor re-enter, as his grant would by such means be defeated. If a person seised in fee in right of his wife make a feoffment to her by deed indented upon condition, and then die, and the heir of the feoffor enters for the condition broken, it is impossible that he should have the same estate which the feoffor had at the time of making the condition, for that was an estate in right of his wife, which was dissolved with the coverture, and therefore when the heir enters upon breach of the condition, and defeats the feoffment, his estate van-

(w) *Doe dem. Harris v. Masters*, 2 B. & Cress. 491; 4 D. & Ry. 45; *Smith v. Doe Lessee Ld. Jersey*, 7 Price, 392; 2 Bro. & B. 502; *Goodright dem. Hare v. Cator*, 2 Doug. 478-486; *Dormer's case*, 5 Rep. 40, B.; *Williams v. Floyd*, Godb. 429.

(x) *Doe dem. Freeman v. Bateman*, 2 B. & Ald. 168; Litt. Sect. 325; Co. Litt. 202, A.; and see *Dockerell v. Dolan*, Longf. & T. 283; 3 Irish Eq. Rep. 552.

(y) *Gascon's case*, Year Book, 7 Hen. VI. fo. 2, by Cheine; *Lloyd v. Langford*,

2 Mod. 176, by Pemberton, argo.

(z) Huds. Comm. 376.

(a) 10 Car. I. sess. 2, c. 4, Irish Hen. VIII. c. 34, English.

(b) *Cranmer's case*, Cro. Eliz. 1; *Lessee Orr v. Stephenson*, 5 Irish Rep. 1; *Flower v. Hartopp*, 16 van; 21 Law Journ. 507.

(c) *Whittingham's case*, 8 Rep. 1, and 44, B.; Co. Litt. 202, A., 1 Year Book, 4 Hen. VI. fo. 2, c. 2, Bro. Abr. Conditions, pl. 71, entry 1, geable, pl. 38.

ntly the estate is vested in the wife, and she, by operation of
nes seised of her ancient estate : and though no right de-
m her husband to his heir, yet the title of entry by force(*d*)
dition, which her husband created upon the feoffment, and
him and his heirs, descends to his heir, who may maintain
and if the husband himself had entered for the condition
would have re-vested the estate in the wife.

-charge granted in fee, with proviso that if the rent be in
grantee may enter and retain the profits until satisfied, en-
?) to recover in ejectment, and it was held that such a right
a conditional inheritance, and descends with the rent to the
when the entry is made, it is then no more than a chattel
the land, which shall go with the arrears to the executors ;
len said, that only for the words in the proviso, “ to retain
ed,” it would have been an inheritance in the land to re-
ie heir as a penalty. If a person make a feoffment in fee,
ent, upon condition that if the rent be not paid, the grantor
ter and hold until satisfied, the feoffor by his re-entry
o estate of freehold, but only an interest, by agreement of
, to take the profits in nature of a distress. If lands be
o a trustee and his heirs, to the use and intent that J. S.
e thereout a certain annual sum, and if such sum be unpaid
in time, that it shall be lawful for the said J. S. and his
re-enter and receive the profits until satisfied ; as soon as
in arrear(*g*), a use, which is served out of the original
ie grantor, springs up and vests in J. S., and by the Sta-
es is immediately transferred into possession, which may be
in ejectment : and upon the assignment of such annual
right of entry and right to receive the rents and profits of
harged with its payment passes to the assignee. However,
rant of a rent to be issuing out of certain lands, with a pro-
f the rent be in arrear the grantor may re-enter, &c., does
any seisin out of which a use can arise to the grantee on
nt(*h*) of the rent, but an interest vests in him when the rent

632; Co. Litt. 336, B.
v. Cowley, 1 Lev. 170; 1
Thos. Raym. 135-158;
92 to Co. Litt. 203, A.
tt. 203, A.
gill v. Hare, Cro. Jac. 510;
; 2 Ro. Rep. 12; Poph.

147, S. C.; Butler's note 93 to Co. Litt.
203, A.; Gilb. on Uses, by Sugd. 178,
in the note.

(*h*) Jemott v. Cowley, 1 Saund. 112;
1 Lev. 170; Thos. Raym. 135-158; 1
Siderf. 262-344; 2 Keble, 270, S. C.

becomes in arrear, which may be reduced into possession by ejectment.

11. If a lessee for lives, or for years, subject to a clause of re-entry limit his interest in demised premises to trustees, to his own use for life, with remainder over, the estates in remainder will be defeated at common law, by the entry of the lessor, on the person in possession of the lands for breach of the condition, because the effect of the re-entry is to revest in the lessor the same estate which he had in the lands at the time of granting the lease.

12. In an ejectment brought to defeat the estate of a lessee for alleged breaches of covenant, the burthen of proof rests on the lessor of the plaintiff, though in an action for breach of covenant, the weight of proof would have been cast on the defendant. Upon the trial of an ejectment for a forfeiture(*j*) in neglecting to insure demised premises, the lessor of the plaintiff must establish in evidence that no insurance had been effected, and the non-production of the policy after notice does not afford even *prima facie* evidence that the defendant had omitted to insure.

13. A forfeiture for a condition broken will be waived by any distinct act of the lessor acknowledging a subsisting tenancy: where half a year's rent was demanded at the day and not paid, and in two days afterwards the lessor received the rent, and gave an acquittance to the party by the name of his farmer, it was resolved(*k*), that the mere acceptance of the money after the day was no waiver of the forfeiture, being a duty owing to the lessor before the breach, but the receipt which was passed, treating the party as a tenant, was held a confirmation of the demise: and it has been said(*l*) by Parke, Baron, that an absolute and unqualified demand of rent by the landlord, or by his agent, duly authorized, amounts to a waiver of the forfeiture, but the receipt(*m*) of part of a gale's rent does not deprive the lessor of his right to re-enter for the residue: however, if the lessor distrain for the rent, for nonpayment(*n*) of which the condition was broken, or if he accept rent falling due upon a subsequent day, he cannot enter for the condition broken, as by such acts the lease is affirmed to have continuance.

(*i*) O'Connors v. Ld. Bandon, 2 Sch. & Lef. 681, note; 1 Ro. Abr. 474, Condition, P.

(*j*) Doe dem. Bridger v. Whitehead, 8 Ad. & Ell. 571; 3 Nev. & P. 557.

(*k*) Greene's case, Cro. Eliz. 3; 1 Leon. 262; Pennant's case, 3 Rep. 64, B.; Harvey v. Oswald, Cro. Eliz. 553-

572; Moor. 456.

(*l*) Doe dem. Nash v. Birch, 1 Mees. & W. 408; Tyrw. & Gr. 769.

(*m*) Year Book, 10 Hen. VII. fo. 24. A., par Keble; Butler's note, 111, to Co. Litt. 211, B.

(*n*) Co. Litt. 211, B.

Upon a question reserved on the trial of an ejectment on the title, appeared that a summons in ejectment for non-payment of a year's rent, due the 1st of May, 1816, had been served on the defendant, when the landlord accepted a consent for judgement, with stay of execution, until 10th of November : a distress(o) was made on the 11th of November for half a year's rent, due the 1st of November immediately preceding, and judgement was entered on the consent upon the 15th of November, and the *habere* executed : the evicted tenant having got back into possession, the ejectment in question was brought, laying the demise on the 29th of November, 1816, and the Court held the distress was not a waiver of the eviction, and gave judgement for the plaintiff.

An application being made to stay proceedings in an ejectment for forfeiture, on the ground that another ejectment was depending in the Queen's Bench between the same parties, to recover the same premises for a forfeiture, which was antecedent(p) to, and distinct from that which formed the subject of the other suit : the Court held that the proceedings could only be stayed where the same point of law was raised, or the same title was called into question in both actions.

Upon ejectment for a forfeiture, grounded on a condition, that in default of building a certain number of houses on demised premises within four years, the lease should become null and void : it appeared that the lease was made on the 4th of May, 1825, for a term(q) of 10 years at a peppercorn rent, and demises were laid in the declaration on the 5th of May, 1829, and the 1st of January, 1841 : the houses were not built, and it was decided that after a lapse of twelve years, an ejectment could not be sustained, without shewing a notice to quit, or at least a previous demand of possession.

14. At any time before execution of the writ of possession, courts of law will relieve the tenant, upon his bringing(r) into Court all rent in arrear and costs, and upon the tenant's accepting a new lease, and dealing a counterpart : and if the ejectment be founded on a clause of re-entry for not repairing, as well as for nonpayment of rent, proceedings will be stayed before trial(s), on payment of the rent in arrear and costs, with liberty to proceed on any other title derived from non-

(o) Jack *dem.* Law v. Donnelly, C. B. 11th April, 1818 ; Appendix, No. 24.

(p) Doe *dem.* Henry v. Gustard, 5 Scott's N. R. 818 ; 2 Dowl. Pr. Ca. 115, N. S.

(q) Doe *dem.* Johnson v. Russell, 4 Irish Law Rep. 170.

(r) Downes v. Turner, 2 Salk. 597 ; Goodtitle v. Holdfast, 2 Stra. 900 ; Phillips v. Dolittle, 8 Mod. 345 ; Doe *dem.* Whitfield v. Roe, 3 Taunt. 403 ; Lessee Moland v. Ejector, Hayes & Jones, 665.

(s) Pure *dem.* Withers v. Sturdy, Bull. N. P. 97.

repair : but courts of common law have no jurisdiction to stay proceedings in ejectment, brought on a condition(*t*) of re-entry for non-repairing.

15. The writ of *cessavit* has been abolished by Statute(*u*) 3 & 4 Will. IV. c. 27, s. 36, and although this mode of proceeding was obsolete for a long time prior to its abolition, the subject is introduced here for the purpose of indicating the source from which some of the provisions of the Irish Statute(*v*) 11 Anne, c. 2, giving the remedy by ejectment for non-payment of rent have evidently been derived. The writ of *cessavit* was founded upon the Statutes of Gloucester(*w*) and of Westminster the Second(*x*), and lay where a tenant holding lands in fee-farm neglected, or ceased to pay his rent, or perform his services for two years consecutively(*y*), and sufficient distress was not to be found on the land. The lord, by this proceeding, was entitled to recover possession of the land, discharged of the tenure, but the writ of *cessavit* did not lie against tenants in tail, or for life, though where a tenure in fee-farm was originally well granted, this writ was maintainable against tenant for life, whose estate was derived under the grant in fee, and on the same principle, it might have been brought by a tenant for life of the fee-farm rent : if the tenant, at any time before final judgement, tendered the arrears, and found sureties for the accruing rents, and for the performance of future services, no judgement was pronounced, and the tenant's estate was preserved. It was also held that the tenant was bound to discharge all the arrears, as well before as after the two years for which the suit had been commenced, together with such damages as the Court thought fit to award, and the sureties were obliged to subject their own lands to the lord's distress in the same form as the tenant's lands were bound. Hence it appears, that the *cessavit* was only applicable to the recovery of rents reserved upon grants of land in fee-farm, and as a person entitled to a fee-farm rent created subsequently to the Statute *quia Emptores* could not be considered a landlord, this proceeding was only available for recovery of fee-farm rents created prior to the reign of Edward the First, or to a fee-farm rent where a tenure had been duly created, and the relation of landlord and tenant continued to subsist.

16. Towards the commencement of the reign of Queen Anne, after

(*t*) Doe *dem.* Mayhew *v.* Asby, 10 Ad. & Ell. 71; 2 P. & Dav. 302; and see Doe *dem.* Gover *v.* Maberly, 10 Ad. & Ell. 74, in the note.

(*u*) 3 & 4 Will. IV. c. 27, s. 36, Eng. and Irish.

(*v*) 11 Anne, c. 2, Irish.

(*w*) 6 Edw. I. c. 4, English and Irish.

(*x*) 13 Edw. I. c. 21, Eng. and Irish.

(*y*) Booth's Real Actions, 133; 2 Co. Inst. 295; 4 Vin. Abr. *cessavit*.

the long continued disturbances in Ireland had subsided, it was soon discovered that the remedies, which had been provided to enforce the payment of rent, were insufficient for the purpose. It was then, and in numberless instances ever since has been, of little use to proceed for recovery of rent by distress, or by action of debt, and it became necessary that the landlord should be allowed, by some safe and speedy means, to rescind the lease in case his rent were not satisfied. If the landlord proceeded at common law upon the clause of re-entry, and was successful in overcoming all the difficulties imposed upon him, and obtained judgement, and entered into possession of the demised premises, the tenant might then exhibit his bill in Equity for relief^(z) against the forfeiture, and compel the landlord to render an account of the rents and profits, which he might, without wilful default, have received out of the premises, and to set off the amount against the rent due out of the lands. The landlord was thus converted into the bailiff of his tenant, and was exposed to the vexation of a contested account, in which the tenant's local knowledge gave him a manifest advantage.

It was contended that the doctrine of affording relief against forfeiture, did not extend to a tenant holding at a *rack-rent*, which must be supposed equivalent to the value of the land, but merely to beneficial leases, where fines had been paid, or large sums had been expended in improvements, and where the tenant is a sort of purchaser of part of the interest in the term. Lord Chancellor King, however, observed^(a), that although he did not like giving relief in such cases after judgement at law, yet the precedents were too strong for him, and upon payment of the rent in arrear and of the costs at law, and in equity, he decreed the landlord to make a new lease for the remainder of the term, *but ordered that a covenant should be inserted binding the tenant to repair during the term*, though there was no such covenant in the original lease. The principle of these decisions is stated to be that where the rent is paid, the object^(b) of the condition of re-entry is attained, and, therefore, the landlord should not be permitted to take advantage of the forfeiture, but where relief was granted after the landlord had entered into possession, the inconvenience which he suffered from his liability to account for the mesne profits does not

^(z) *Dorrington v. Jackson*, 1 Vern. 449, A. D. 1687; *Webber v. Smith*, 2 Vern. 103, A. D. 1689; *Canny v. Hodgkins, Hayes & J.* 769.

^(a) *Taylor v. Knight*, 4 Vin. Abr. 407; *Chancery, Y. 3*; *De Scarlett v.*

Dennett, 9 Modern. 22; *Woodward v. Ld. Lincoln, Finch*, 86.

^(b) *Wadman v. Calcraft*, 10 Vesey, 68; *Davis v. West*, 12 Vesey, 476; *Hill v. Barclay*, 18 Vesey, 56.

appear to have been taken into consideration. Courts of Equity ~~did~~ not fix any precise period, within which the tenant was bound to ~~ap-~~ply for relief(*c*) but exercised a discretionary authority according to ~~the~~ circumstances of each particular case. The original tenant ~~having~~ acted unconscientiously towards his landlord, and a new tenant ~~having~~ laid out money(*d*) in improving the evicted premises, a bill by ~~the~~ original tenant for relief against the forfeiture was dismissed with ~~costs~~. The consequence was that the landlord always continued liable to ~~an~~ uncertainty of possession(*e*) as it was in the power of the evicted tenant, at any time, to offer him compensation, in order to found ~~an~~ application for relief in Equity; after an eviction for non-payment ~~of~~ rent and after the time allowed for redemption had expired, ~~the~~ evicted tenant brought a counter-ejectment(*f*) for the purpose of ~~invalidating~~ impeaching the validity of the proceeding, which the landlord ~~successfully~~ resisted by relying on a valid eviction at common law for a forfeiture ~~and~~ and the tenant was reinstated, upon a bill filed in the Exchequer(*g*) upwards of two years and nine months after the redemptionary period had expired.

(*c*) Doe *dem.* Hitchings *v.* Lewis, 1 Burr. 619, by Lord Mansfield; 2 Lord Kenyon, 320, S. C.

(*d*) Dorrington *v.* Jackson, 1 Vern. 440.

(*e*) Doe *dem.* Hitchings *v.* Lewis, 1

Burr. 619; 2 Ld. Kenyon, 320.

(*f*) Lessee Warrington *v.* Hodgkinson & Batty, 311.

(*g*) Canny *v.* Hodgkins, Hayes & 769.

CHAPTER VIII.

NON-PAYMENT OF RENT.

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| <p>17. <i>Irish Statute, 11 Anne, c. 2, where more than Half-a-Year's Rent is due.</i></p> <p>18. <i>Corresponding English Act, 4 Geo. II. c. 28.</i></p> <p>19. <i>Objects of the Statute.</i></p> <p>20. <i>Requisites to support Ejectment under this Act.</i></p> <p>21. <i>Insufficient Distress.</i></p> <p>22. <i>Contents of necessary Affidavits.</i></p> <p>23. <i>Proofs required on the Trial.</i></p> <p>24. <i>— on a Counter-Ejectment by evicted Tenant.</i></p> | <p>25. <i>Mortgagees out of Possession not affected by this Act.</i></p> <p>26. <i>Statute 4 Geo. I. c. 5, where more than one Year's Rent due.</i></p> <p>27. <i>Statute 8 Geo. I. c. 2, where a whole Year's Rent due.</i></p> <p>28. <i>Statute 5 Geo. II. c. 4, dispensing with Clause of Re-entry.</i></p> <p>29. <i>Statute 25 Geo. II. c. 13, Remedy given upon executory Articles.</i></p> <p>30. <i>Statute 15 & 16 Geo. III. c. 27, dispensing with Demand after Rent ascertained.</i></p> |
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17. For the purpose of facilitating the recovery of the rent of demised premises, the Statute(a) of the eleventh of Queen Anne, c. 2, was passed by the Irish Legislature, whereby, after reciting that great inconveniences frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties that attend re-entries at common law ; and that after a re-entry made, the lessee, or his assignee, upon one or more bills filed in a Court of Equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise pending the suit, runs much more in arrear, without giving any security for the rents due, when such re-entry was made, or which shall afterwards incur ; *it is enacted* that, in all cases between landlord and tenant, as often as it shall happen that *more* than one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand, or re-entry, serve a summons in ejectment for the recovery of the demised premises, which summons in ejectment shall stand in the place and stead of a demand and re-entry : and in case of judgement against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the Court, where the suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that *more* than half a year's rent was due before the summons was served, and that no sufficient distress was to be

(a) 11 Anne, c. 2, s. 2, Irish ; 4 Geo. II. c. 28, English.

found on the demised premises countervailing the arrears then due and that the lessor or lessors in ejectment had power to re-enter; then and in every such case, the lessor or lessors in ejectment shall recover judgement and execution in the same manner as if the rent had been legally demanded, and a re-entry made: and in case the lessee or lessees, his or their assignee or assignees, or other person or person claiming, or deriving under the said leases, shall permit and suffer judgement to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrear, together with full costs, and without filing any bill for relief in Equity, within six calendar months after execution executed; then and in such case the lessee and lessees, his or their assignee or assignees, and all other persons claiming and deriving under the lease, shall be barred and foreclosed from all relief or remedy in law or Equity, other than by writ of error for reversal of such judgement, in case the same shall be erroneous; and the landlord or lessor shall from thenceforth hold the demised premises discharged from the lease; and if on such ejectment verdict shall pass for the defendant, or defendants, or the plaintiff shall be nonsuited therein, except for the defendant or defendants not confessing lease, entry, and ouster, then such defendant or defendant shall have and recover his and their full costs: but(b) that nothing in this Act contained shall extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who shall not be in possession.

In case(c) the lessee or lessees, his or their assignee or assignees, or other person or persons claiming any right, title, or interest in law or Equity, of, in, or to the lease, shall, within the time aforesaid, file a bill(d) for relief in any Court of Equity, such person or persons shall not(e) have, or continue any injunction against the proceedings at law on such ejectment, unless he or they do, or shall, within forty days next after a full and perfect answer shall be filed by the lessor or lessors of the plaintiff in such ejectment, bring into Court and lodge with the proper officer, such sum and sums of money as the lessor or lessors of the plaintiff in such ejectment shall in his or their answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court: and in case such bill shall be filed

(b) Sect. 3, saving the rights of mortgagees.

(c) Sect. 4.

(d) Before execution executed.

(e) See Stat. 25 Geo. III. c. 51, Irish, for preventing vexatious injunctions.

within the time aforesaid, and (afterwards)(*f*) execution is executed, the lessor or lessors of the plaintiff shall be accountable only for so much and no more as he or they shall really and *bond fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his or their entering into the actual possession thereof; and if what shall be so made by the lessor or lessors of the plaintiff happen to be less than the rent reserved on the lease, then the lessee or lessees, his or their assignee or assignees, before he or they shall be restored to his or their possession, shall pay such lessor or lessors, or landlord or landlords, what the money so by them made fell short of the reserved rent, for the time such lessor or lessors of the plaintiff, landlord or landlords held the lands.

If the tenant(*g*) or tenants, his or their assignee or assignees, do or shall, at any time *before* the trial in such ejectment, pay or tender the lessor or landlord, his executors or administrators, or his or their agent or attorney, in that cause, all the rent and arrears, together with the costs, then and in such case, all further proceedings on the ejectment shall cease and be discontinued: and if such lessee or lessees, his or their executors, administrators, or assigns, shall upon such bill, be relieved in Equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease to be thereof made to him or them: but no proceedings(*h*) by virtue of this Act for breach of any condition, shall prejudice the right or title of any infant, *feme-covert*, person being *non compos mentis*, or being out of Her Majesty's dominion.

By the Irish Statute, 8 Geo. I. c. 2, it is enacted(*i*), that in all ejectments which shall be served for non-payment of rent, notice shall be given in writing, on the service of such ejectment, that it is brought on account of non-payment of rent.

18. The remedies provided by the English Statute(*j*), 4 Geo. II. c. 28, for facilitating the recovery of rent, by means of an ejectment founded on the condition of re-entry, are nearly similar to, and evidently have been borrowed from the Irish Act. The English Statute only requires one-half year's rent to be in arrear, and in case the declaration in ejectment cannot be regularly served, or no tenant be in actual possession of the premises, the landlord is authorized(*k*) to affix

(*f*) The word used in the Act is *after*, meaning *afterwards*.

(*g*) Sect. 5.

(*h*) Sect. 8, this section is repealed by the 56th Geo. III. c. 88, sect. 14, Irish.

(*i*) 8 Geo. I. c. 2, s. 7, Irish.

(*j*) 4 Geo. II. c. 28, English; 11 Anne, c. 2, Irish.

(*k*) By the Irish Stat. 15, 16 Geo. III. c. 27, a clause nearly similar is introduced with respect to absconding tenants.

it upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands comprised in the ejectment, and such affixing is to be deemed legal service thereof: but nothing contained(*l*) in this Act is to extend to bar the right of any mortgagee of any such lease or any part thereof, who shall not be in possession, so as such mortgagee shall, within six calendar months after judgement obtained, an execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor, person, or persons entitled to the remainder or reversion, and perform all the covenants and agreements which, *On* the part of the first lessee or lessees, are or ought to be performed.

19. This Statute did not introduce(*m*) any new procedure for recovery of rent in arrear, but facilitated the remedy by ejectment, grounded on the condition of re-entry, by dispensing with the necessity of making any previous demand of the rent, and by limiting(*n*) and confining the tenant to a period of six calendar months after execution executed, for obtaining relief from a Court of Equity: the landlord was also allowed to take advantage of the Statute to evict the tenant's interest for non-payment of rent, and by the same ejectment to proceed at common law(*o*) to recover the demised premises for breach of any other covenant in the lease, to which the proviso of re-entry extended. An ejectment grounded exclusively on(*p*) this Statute is seldom brought as an easier and more effectual remedy is provided by the Statutes subsequently enacted, where a full year's rent is in arrear; sometimes, however, it is expedient to proceed under the earlier Act, either with a view of preventing the commission of waste, or where a tenant, for the purpose of defeating an expected ejectment, pays quit-rent, head-rent, or other outgoings, to which the lands are subject, so as to reduce the arrear to less than a year's rent.

20. An ejectment can only be maintained under this Statute, first, in cases where the relation of landlord and tenant subsists; secondly, where *upwards* of half a year's rent is in arrear; thirdly, where the tenant holds under an instrument in writing, containing an *actual* demise of the premises, with a clause of re-entry, and reserving a rent payable at stated periods: fourthly, the landlord must have a right to

(*l*) 4 Geo. II. c. 28, s. 2, English; 8 Geo. I. c. 2, Irish, contains a similar provision where one year's rent is in arrear.

(*m*) 11 Anne, c. 2, Irish.

(*n*) Doe *dem.* Hitchings v. Lewis, 1 Burr. 614.

(*o*) Pure *dem.* Withers v. Sturdy, Bull. N. P. 97; Roe *dem.* West v. Davis, 7 East, 363; Hardman v. Calcraft, 10 Vesey, 67; Swanton v. Biggs, Beatty, 173.

(*p*) 11 Anne, c. 2, s. 2, Irish.

the time of bringing the ejectment, and fifthly, where no distress is to be found on the demised premises.

Secondly given by this Statute is, in express terms, restricted between landlord and tenant, and, in order to constitute that claimant in ejectment(*q*) must have a reversion in the premises, expectant on the determination of the tenant's lease, or right to be evicted, or there must be a tenure subsisting between the parties, and, in order to guard against surprise, a notice to be served(*r*) along with the declaration in ejectment, stating that the cause is for non-payment of rent. The tenant must hold the land by lease or instrument in writing, containing an actual demise, and reserving to the lessor a condition of re-entry: a lease, or accepted proposal for a lease, will not constitute an ejectment under this Statute: the lease, or instrument of demise, must not only contain a proviso of re-entry, but the landlord must, at the time(s) of bringing the ejectment, have the right or power to re-enter, and, therefore, if the condition of re-entry has been discontinued or avoided(*t*), the ejectment cannot be sustained.

Where there is no available distress on the demised premises(*u*) sufficient to satisfy the rent in arrear, the landlord cannot recover under the Statute. In order to establish the want of sufficient distress, it must be proved that search was made on some day(*v*) after the day of the bringing of the ejectment, in every house and place on the premises, where distress might be procured without obstruction: a cottage or house not having been searched, it was contended to be unnecessary to examine every private place where the tenant might have goods, and that it was enough to prove there was no sufficient distress *visible* on the premises, but the Court held, that every part of the premises(*w*) should be looked into, for the purpose of substantiating a forfeiture of his lease: and, in a subsequent case observed by O'Grady, C. B., that the meanest pig-sty or depository of an effectual distress, and the furniture of

Shawcett v. Hall, Alc. & Nisi Prius, 2 B. & Ald. 180; *Lessee Bon-Batty*, 171-178; *Lessee Batty*, 80-102.

c. 2, s. 7, Irish, renders distress necessary in all cases.

See Keiley v. Ahearne, point, in the note; *Doe*

dem. Lawrence v. Shawcross, 3 B. & Cress. 752; 5 D. & Ry. 711, S. C.

(*t*) See title Conditions, *ante*, 565.

(*u*) *Doe dem. Forster v. Wandlass*, 7 T. R. 117.

(*v*) *Doe dem. Smelt v. Fuchau*, 15 East, 286.

(*w*) *Rees dem. Powell v. King*, Forrester's Rep. 19; *Smith v. Doe dem. Lord Jersey*, 2 Br. & B. 514, by Burrough, J.

the meanest cottage might be sufficient to turn the balance(*x*) as to the adequacy of the distress: if the person employed to distrain be resisted in his examination, or an effectual search cannot be made without forcing locks, or doing injury(*y*) to the premises, the jury will be warranted in presuming that no sufficient distress was to be found, or could be got at, countervailing the arrear of rent due, for if the place be not open to the distress, it is the same thing as if there was no property liable to distress. Proof of want of sufficient distress upon the premises on any day(*z*) after the rent is in arrear, affords such *prima facie* evidence, as will render it incumbent on the tenant to shew there was sufficient distress on the lands, within the terms of the proviso of re-entry. A defendant, however, is concluded by his admission made at the time of the service of the summons(*a*) in ejectment, that there was not sufficient property on the premises, liable to distress, to counterbalance the arrears of rent then due, and he will not be suffered to prove that such admission was untrue: evidence of this kind may supply omissions in a defective search, but should not be relied on as superseding the necessity of a diligent examination for distrainable property. A landlord is authorized, by the Irish Statute(*b*) 56 Geo. III. c. 88, to distrain growing crops; but an ejectment lies for non-payment of rent under the Act of the 11 Anne, c. 2, although the value(*c*) of the growing crops, at the time of the service of the ejectment, was more than sufficient to satisfy the arrears of rent then due.

22. The person employed to serve an ejectment under this Act is usually furnished with an authority to distrain, so as to enable him to prove the want of sufficient distress, and after making diligent search, and serving all necessary parties, the landlord, or his agent, then joins with the bailiff in an affidavit(*d*), by which the bailiff deposes to the service of the summons in ejectment and notice on the several tenants, and that at the time of effecting such service, and previous thereto, no sufficient distress was to be found on the premises countervailing the arrears of rent then due thereout to the landlord; and the landlord, or his agent, deposes that a sum of [£60], exceeding one half year's rent,

(*x*) Loveland *dem.* Tuthill *v.* Molony, Huds. Comm. 474-477; Lessee Bryan *v.* Howard, 3 Law Rec. 303, 1st ser.

(*y*) 1 Ro. Abr. 428, Condition, T. pl. 3; Doe *dem.* Chippendale *v.* Dyson, Moo. & M. 76.

(*z*) Doe *dem.* Smelt *v.* Fuchau, 15 East, 286; Lessee Cowan *v.* Chambers, Hayes, 544.

(*a*) Trustees of Salem *v.* Williams, 9 Wendell, 147.

(*b*) 56 Geo. III. c. 88, s. 15, Irish; 11 Geo. II. c. 19, s. 8, English.

(*c*) Loveland *dem.* Tuthill *v.* Molony, Huds. Comm. 474; Horan *dem.* Warrington *v.* Hodgins, Huds. Comm. 479; Batty, 330.

(*d*) Tidd's Forms, c. 20, s. 29.

due to the landlord for rent of the premises up to, and for the coming gale-day, by virtue of an indenture of lease made between, whereby such lessor demised the premises to J. S. at the rate of [£100], payable half-yearly, on every 25th of March and 25th of September, and that such indenture contained a proviso that, in case of non-payment of such rent, to re-enter, that, at the time of the service of such ejectment, the landlord might re-enter on the premises, by virtue of such lease for non-payment of the rent so in arrear.

In case of judgment against the casual ejector, or of nonsuit for want of lease, entry, and ouster, it must be shewn to the Court that the plaintiff, or be proved on the trial, in case the defendant appears, that more than half a year's rent was due before the summons in ejectment was served, and that no sufficient distress was to be found on the premises countervailing the arrears of rent then due, and that the lessor or plaintiff in ejectment had power to re-enter: it is the usual practice to include in the affidavit of service, a statement of the rent in arrears, and of the want of sufficient distress, though it does not seem necessary to do so, for if the defendant appear on the trial, such matters may be proved, and need not be alleged by affidavit, and in case of judgment by default(e), an affidavit of such facts may be filed at any time before the issuing of the writ of possession.

The Statute was not intended by the enactments of this Statute, to prescribe the proofs which should be made on the trial, but merely to require the facts as were necessary to be substantiated by affidavit, in case of judgment by default, and which were also required to be proved by the testimony on the trial when the defendant appeared: according to the practice in England, service(f) of the ejectment must be proved by witnesses on the trial, but in Ireland, an attested copy(g) of the affidavit of service is received as conclusive evidence of the service of the declaration, summons, and notice in ejectment on the several persons in the manner therein set forth: it is not requisite that any comparison should be offered of the comparison(h) of such an attested copy with the original record, as the production of the document, with the signature by the proper officer, establishes its authenticity.

How. Law Exch. 68; Jack v. M'Roberts, 1 Jebb & S.

Will. Evidence, 279, 7th edit.; Evidence, 304; Peake's Evid. dem. Gooch v. Knowles, 8

(g) Lessee Harris v. Prendergast, 2 Fox & Sm. 345-353, and the note.

(h) Lessee Boyle v. Kiernan, 2 Irish Law Rep. 273; and see the Irish Stat. 1 & 2 Geo. IV. c. 53, which imposes a penalty on the officer, if the copy be not duly compared.

The fact of service of the ejectment must be proved on the trial because such service is substituted by the Statute for the demand of the rent, which, at common law, was necessary to be shewn; and the time of effecting the service must be proved, for the purpose of shewing the period to which the rent is to be calculated, and evidence must also be given⁽ⁱ⁾ of the service of a written notice, that the ejectment is brought for non-payment of rent: Lord Guillamore seems to have entertained an opinion^(j), that in proceeding under this Statute parol testimony alone was admissible, for the purpose of proving service of the ejectment, but it has been the invariable^(k) practice to receive an attested copy of the affidavit of service, as proof of the fact of service, both of the summons in ejectment and of the requisite notice.

The lease by which the lands were demised, must be proved on the trial; where the ejectment is brought by an assignee of the reversion, and the defendant appears, the claimant's title to the reserved rent must be regularly deduced, and evidence must be given of possession^(l) under the demise, by shewing payment of rent, or other acknowledgement of the tenancy. The power to re-enter which the Statute requires, is rather a legal inference, than a matter of fact, for if the lease contain a proviso of re-entry, the lessor, his heirs and assigns, will *prima facie* have a right to re-enter in case of non-payment of the rent, and it lies on the defendant to shew that the landlord, after making the lease, parted with his reversion, or did some act which defeated his right to re-enter.

24. If a tenant bring a counter-ejectment *on the title*, to recover back possession of lands, evicted by judgement in ejectment for non-payment of rent, founded on this Statute, the landlord is not required to prove on the trial of the second ejectment, that his former ejectment was in all points^(m) sustainable, but it will be incumbent on the evicted tenant to establish by evidence that there was sufficient distress on the premises at the time of the service of the summons in ejectment, to satisfy the rent then due, or to prove such other matters as will avoid the eviction.

25. In proceeding under this Statute, where the lessee's interest has been granted in mortgage, and the mortgagee is not in possession, his mortgage is protected, so that the landlord, in such cases, can only

(i) The Irish Statute, 8 Geo. I. c. 2, s. 7, renders such notice necessary in all cases.

(j) Lessee Stuart v. Smith, Batty, 317, note.

(k) Lessee Harris v. Prendergast, 2

Fox & S. 353.

(l) Lessee Servante v. Hartley, Batty, 179.

(m) Long dem. Connor v. Disney, 2 Huds. & Br. 113.

the tenant's equity of redemption in the demised premises(*n*), it merely contemplates a personal eviction, or eviction *sub* not necessarily a complete eviction of the lease : hence if the interest had been mortgaged, and the landlord was desirous to lease for non-payment of rent, he was obliged to proceed, in law, for the forfeiture, and make a formal demand of the rent, it was also requisite(*o*) prior to the Irish Statute, 56 Geo. III. to adopt a similar mode of proceeding, whenever the tenant was to be an infant or lunatic, or was absent from the realm.

The difficulties attending the recovery of rents in Ireland by distress made it expedient to extend the remedy by ejectment to cases where the value of the distrainable property on the lands was sufficient to satisfy the arrear of rent, and accordingly, by the Statute(*p*) c. 5, it is enacted, that, as often as it shall happen that *more* than one year's rent shall be due and in arrear to any landlord or lessor, though there be distress sufficient on the land to answer the arrear, such landlord or lessor may serve a summons in ejectment for recovery of the demised premises, and in case of judgement for the landlord, or nonsuit for not confessing lease, entry, or possession, if it shall be made appear to the Court, where such suit is brought, by affidavit of such landlord or lessor, his agent or receiver, that more than one year's rent was due before such summons was served, and in every such case, the landlord or lessor, (or) his ejectment shall recover judgement and have execution thereon by the jury that shall try the cause, in case it shall be before a judge, or if not, the judge, before whom the judgement shall be given, shall ascertain the sum that shall be so due and in arrear ; and the lessee or lessees, his or their assigns, or other person or persons claiming, or deriving under the lease, shall permit and suffer to be had and recovered on such ejectment, and execution thereon, without paying *on demand*(*q*) the rent so as to be in arrear, together with full costs, or depositing the same in the Court of Equity on filing a bill within six months after execution, then and in such case, the lessee or lessees, his or her or her assigns, and all other persons claiming or deriving

Stuart v. Smith, Batty,
The Irish Statute, 8 Geo. I.
a landlord to defeat a mort-
nant's interest for non-pay-

(*o*) 56 Geo. III. c. 88, s. 14, Irish.

(*p*) 4 Geo. I. c. 5, s. 3, Irish.

(*q*) Demand of the rent after ascer-
tainment, made unnecessary, by Statute
15 & 16 Geo. III. c. 27, Irish.

under the lease, shall be barred and foreclosed from all relief or remedy in law or Equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous; and the landlord or lessor shall thenceforth hold the demised premises discharged from the lease.

And where any bill(*r*) shall be filed in Equity, on the plaintiff depositing the rent so proved in arrear with the costs, the proceedings thereon shall be in the same manner, and such relief given as by any former Act(*s*) is directed and appointed; and if on such ejectment verdict shall pass for the defendant or defendants, or the plaintiff shall be nonsuited therein (except for the defendant or defendants not confessing lease, entry, and ouster), then such defendant or defendants shall have and recover his or their full costs: but nothing contained in this Act shall extend(*t*) to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, or to defeat the estate, right, or title of any person(*u*) under disability.

27. By the Statute, 8 Geo. I. c. 2(*v*), after reciting that several artifices had been made use of to evade the intention of the preceding Act, particularly by taking defence in the name of persons not deriving title under the lease, whereby the plaintiff was obliged to make out the title of his lessor, it is enacted, that, as often as it shall happen that on a whole year's rent or more shall be due and in arrear to any landlord or lessor, such landlord or lessor may bring an ejectment for recovery of the demised premises; and upon service of the summons in ejectment, *notice in writing* shall be given to the person, on whom such summons shall be served, that the ejectment is brought on account of the non-payment of rent; and if any person or persons shall, after affidavit made of such service, take defence in such ejectment, and shall appear on the trial, and confess lease, entry, and ouster, and the plaintiff shall then make due proof of the perfection of the counterpart(*u*) of the lease, by which such rent is reserved, and that such landlord or lessor, or those under whom he derives his title, have been in possession of such lands, tenements, or hereditaments for three years(*x*) before service of such ejectment, or shall shew any sufficient title to the premises for which the ejectment shall be brought, and it shall appear in evidence on the trial that one whole year's rent or more is due to such landlord

(*r*) Section 4.

(*s*) 11 Anne, c. 2, s. 4, Irish.

(*t*) 8 Geo. I. c. 2, ss. 4 and 5.

(*u*) Repealed by Statute, 56 Geo. III. c. 88, s. 14.

(*v*) 8 Geo. I. c. 2, s. 1, Irish. This Statute must be interpreted as if it

formed part of the 4 Geo. I. c. 5; see *Black v. Davis, Batty*, 99.

(*w*) Qualified by the 5 Geo. II. c. 4 s. 3.

(*x*) *Lessee Friend v. Scott, Batty*, 179, note.

or lessor, then the plaintiff shall recover and have judgement in such manner, and under such provisoes, as by the former Acts is directed and appointed.

And where any lease(y) for avoiding of which such ejectment is brought shall, before the bringing such ejectment, have been mortgaged for a valuable consideration(z), and the lessee and mortgagee, and their respective assignees, shall be duly served with the summons in ejectment, and a proper affidavit or affidavits of the summons shall be made and duly filed, and the plaintiff shall obtain judgement and execution; then, if the mortgagee or his assignee shall not, within nine months after such execution executed, pay or tender unto such landlord or lessor, the rent in arrear and costs, to be ascertained in such manner as by the former Acts is directed; then such mortgagee or his assignee shall be barred and foreclosed of all relief or remedy, in law or Equity, on account of the mortgage, and the landlord and lessor shall thenceforth hold and enjoy the demised premises discharged and freed from such mortgage, and the equity of redemption: and that every(a) mortgage of any lease, and every assignment thereof shall be registered in such manner as is required by the Statute for the public registering of deeds, conveyances, and wills, within six calendar months after perfection thereof, and in default of registering such mortgage or assignment in manner aforesaid, the landlord or lessor may proceed in ejectment, and obtain judgement and execution thereon, although such mortgagee or assignee be not served with summons in ejectment, in such manner as if such mortgagee or assignee had been duly served: and it is enacted(b), that in all ejectments which shall be served for non-payment of rent, notice shall be given in writing, on the service of such ejectment, that it is brought on account of non-payment of rent.

28. The Statute 5 Geo. II. c. 4(c), after reciting that several lands, tenements, and hereditaments, in divers parts of this kingdom, had theretofore been demised for terms of lives, or years determinable upon lives, by leases, minutes, or contracts in writing, *containing an actual demise(d)*, wherein no clause of re-entry had been inserted, and that a doubt had been conceived, whether the landlord or lessor, and those claiming under him, for want of such clause of re-entry, by the several Statutes then in force for preventing of frauds committed by

(y) 8 Geo. I. c. 2, s. 4.

(z) *Biddulph v. St. John*, 2 Sch. & Lef. 534. This section applies to assignees of the lease, as well as of the mortgage.

(a) Section 5.

(b) *Lessee Harris v. Prendergast*, 2 F. & Sm. 352, and the note.

(c) 5 Geo. II. c. 4, s. 1, Irish.

(d) A similar provision extended to instruments not containing an actual demise; 25 Geo. II. c. 13, s. 3.

tenants, could bring an ejectment for the recovery of such lands demised, although more than a year's rent was in arrear, *enacts* where one whole year's rent or more shall be due and in arrear to the landlord or lessor for any lands, tenements, or hereditaments so held thereafter to be held by any such lease, minute, or contract in writing, such landlord or lessor, or those lawfully claiming from or under him or them, may bring his or their ejectment, and recover the possession of such lands, tenements, and hereditaments so demised, in the same manner, to all intents and purposes, as if a clause of re-entry had expressly contained in such lease, minute, or contract in writing, or not otherwise.

And after reciting(*e*), that by the several Acts then in force for the more effectually preventing frauds committed by tenants, the landlord or lessor, upon the trial of ejectments for non-payment of rent, must produce proof of the perfection of the counterpart(*f*) of the lease by which the rent is reserved, before he can recover in such ejectment, which sometimes happens to be impracticable, by reason no counterpart was perfected, or, if perfected, has been lost, or so mislaid that it cannot be produced and proved upon such trials, as the said Acts direct and require, for remedy whereof it is enacted, that on any trial in ejectment for non-payment of rent, in pursuance of this or of the former Acts, where one year's rent or more is due and in arrear before the summons for such ejectment, where it shall be necessary to produce the counterpart of any lease, minute, or contract containing an actual demise, if it shall appear to the Court that no counterpart was perfected, or, if perfected, that such counterpart is lost, or so mislaid that it cannot be produced and given in evidence upon such trial: then, and in such cases, the landlord or lessor or lessors in such ejectment shall give in evidence the original lease, minute, or contract, or a copy thereof, or a copy of such counterpart, and that the lessee or lessees therein named enjoyed the lands which such ejectment shall be brought, under such lease, minute, or contract, such original lease, or a copy thereof, or a copy of the counterpart, shall be of the same force and effect as if the counterpart of such lease, minute, or contract had been produced and proved upon the trial.

29. By the Statute(*g*) 25 Geo. II. c. 13, it is enacted, that where any article, minute, or contract in writing then was, or shall be made of any lands, tenements, or hereditaments, and the rent payable for the same, ascertained by such article, minute, or contract, and the pe-

(*e*) Section 3.

(*f*) By the 8 Geo. I. c. 2, s. 1.

(*g*) 25 Geo. II. c. 13, s. 2.

or persons to whom such article, minute, or contract is or shall be made, or any deriving under him or them, hath or have enjoyed, or shall enjoy the said lands under such article, minute, or contract, and one whole year's rent or more shall be unpaid, or in arrear, to any landlord for the said lands, such landlord, or those lawfully claiming from or under him, may bring his ejectment, and recover the possession of such lands so enjoyed, in the same manner, to all intents and purposes, as if such article, minute, or contract in writing contained an actual demise, and as if a clause of re-entry had been expressly specified therein, and not otherwise.

30. By the Statute(*h*) 15 & 16 Geo. III. c. 27, after reciting that a doubt had lately been entertained, whether, under the construction of the Irish Act, 4 Geo. I. c. 5, after the rent in arrear shall be ascertained as by the said Act directed, the rent so ascertained ought not to be *demanded* from the lessee or his assigns, it is enacted, that it shall not be necessary to make such demand.

(*h*) 15 & 16 Geo. III. c. 27.

CHAPTER IX.

NON-PAYMENT OF RENT.

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| 31. <i>Ejectment Acts to be construed as one Code of Law.</i> | 39. <i>Nugent dem. Keane v. Le</i> |
| 32. — <i>founded on the common Law Right of Re-entry.</i> | 40. <i>Ambiguity in Affidavit explained by parol Tes</i> |
| 33. <i>Whether Affidavit of Service is in the Nature of Process, or is a Requisite of Title.</i> | 41. <i>Service of Ejectment on Tenant sufficient for panion.</i> |
| 34. <i>Whether Defendant may shew that another Person was not duly served.</i> | 42. <i>Variance between second tion, and Ejectment ser</i> |
| 35. <i>Or that the Defendant himself has the legal Estate, and was not duly served.</i> | 43. <i>Rights of Mortgagees of Lease.</i> |
| 36. <i>Inconvenient Consequences of holding Affidavit of Service Part of the Landlord's Title.</i> | 44. <i>Summary of Decisions Parties to be served.</i> |
| 37. <i>Conflicting Decisions.</i> | 45. <i>Competitors for the Reve not be served.</i> |
| 38. <i>Subject reconsidered and reviewed by the King's Bench.</i> | 46. <i>Infants, Lunatics, &c. served. Or Service substituted.</i> |
| | 47. <i>Where Lands comprise Lease lie in different C</i> |

31. LANDLORDS may recover possession of demised premises on the regular expiration of the term, for breach of a condition of payment of rent, either by entry at common law for the for legal proof made of the rent being demanded; or secondly, for non-payment of any sum exceeding half a year's rent, possession recovered by force of the Statute 11 Anne, c. 2, on shewing sufficient distress on the premises; or lastly, if a year's rent cannot be paid, or is in arrear, landlords may avail themselves of the subsequent Statutes which were intended to provide an easy and effectual remedy for forfeiting the lease, if the rent should not be satisfied within the period. All the Ejectment Acts^(a) are to be construed as forming but one code, and the provisions of the Statute 11 Anne are so far as they have not been varied, or superseded by later enactments, still continue applicable to ejectments for non-payment of more than a year's rent: the subsequent Statutes merely facilitate the remedy in particular cases, and may be considered as successive amendments of the original Act on the subject.

32. An opinion, however, was intimated by the Court

(a) *Biddulph v. St. John*, 2 Sch. & Lef. 530, by *Ld. Redesdale*; *Ld. Kenmare v. Magee dem. Suppl. Scr. 1.*

quer(b), that the remedy provided by the Ejectment Acts for recovery of rent was not analogous to, or to be considered as founded on the condition of re-entry at common law, but was a new proceeding, introduced by the legislature for the benefit of landlords: notwithstanding such high authority, it is difficult to reconcile this doctrine with the express provisions of these Statutes, or with the principles on which they are framed, nor has it been adopted in the other Courts.

It has already been observed that in ejectments *on the title*, a practice had been introduced of serving a copy of the summons or declaration, not only upon every person in possession of any part of the premises sought to be recovered, but also upon every person having or claiming any estate or interest in the lands, though not in possession: a similar practice has been pursued in the service of ejectments for non-payment of rent, and it is a very important consideration in ejectments of this latter description, to ascertain who are the necessary parties to be served, for the purpose of defeating the interests of all persons deriving under the lease of the demised premises. Upon re-entry at common law, for breach of a condition for non-payment of rent(c), no legal estate vested in the landlord until the rent had been duly demanded, and by(d) the Act of the 11 Anne, c. 2, service of the summons in ejectment is substituted in place of such demand: it is, therefore, requisite, according to the practice in England, in case the defendant appears on the trial, to give parol evidence(e) of the service of the declaration in ejectment upon the tenants of the lands; but whatever may have given rise to a different course of procedure in Ireland, it is a settled rule, that an attested(f) copy of the affidavit of service of the declaration and notice forms a necessary part of the evidence on behalf of the plaintiff, to entitle him to a verdict.

33. Service of the ejectment being substituted for the common law demand, the affidavit of such service has been considered an essential requisite of the landlord's title to recover, and if it appear from the affidavit, that such service was defective, or insufficient, the Court of Exchequer hold that the ejectment cannot be sustained, and that if the defendant, after such bad service, appear on the trial, there should be a non-suit,

(b) Lessee Keiley v. Ahearne, Batty, 19, in the note.

(c) Doe dem. Lawrence v. Shawcross, 3 B. & Cress. 756, by Holroyd, J.; 5 D. & Ry. 711, S. C.

(d) 11 Anne, c. 2, s. 2, Irish; 4 Geo. II. c. 28, s. 2, English.

(e) 2 Starkie's Evid. 304; Rosc. Evidence, 445; Doe dem. Hitchins v. Lewis, 1 Burr. 620; Doe dem. Gooch v. Knowles, 8 Jurist, 19.

(f) Lessee Harris v. Prendergast, 2 Fox & Sm. 353, and the note at the end of the case.

because(*g*) a person either not served, or badly served, ought not to be prejudiced, *as he cannot(h) be taken to permit and suffer judgement to be had and recovered against him*, after appearance, as required by the Act, without redeeming. In delivering the judgement of the Court of Exchequer, Lord Guillamore(*i*) stated, that the necessity of proving the fact of service of the ejectment by the production of an examined copy of the affidavit, instead of by parol evidence, was derived from the Statute 8 Geo. I. c. 2, which enacts, that if any person shall, *after* affidavit made of such service (not after proof), take defence in such ejectment, and shall appear on the trial, the plaintiff *then*, on making the proofs enumerated by the Statute, shall recover: that the landlord is let in to make the required proofs, by the appearance of the defendant, *after such affidavit* of due service filed, but that the defendant's appearance does not preclude him from shewing, that it was not an appearance *after such an affidavit*, that is, that the affidavit either was defective, or shewed a defective service according to the practice of the Court. The King's Bench, however, never acquiesced in this doctrine, and determined that the affidavit of service(*j*) was in the nature of process, and did not constitute any part of the landlord's title, though always(*k*) produced on the trial for the purpose of shewing that the ejectment was brought for non-payment of rent.

34. It was ruled by the Exchequer, in the case of the Lessee(*l*) in *Ryall v. Keane*, that a tenant who had taken defence might, by reference to the affidavit of service, shew that he had not been properly served with the ejectment, and in consequence of this decision, an opinion very generally prevailed, that a defendant who was duly served might successfully(*m*) object on the trial, that the affidavit shewed a defective service upon another person: a middle course, however, was pursued, by holding that a defendant who had been duly served, might set up as an available defence, that another(*n*) person, *who had in his the legal estate under the lease*, was not duly served, though such third person never had been in possession; but that the defendant in such case would be obliged to prove that the lease sought to be

(*g*) Lessee *Stuart v. Smith*, Batty, 316-319; Lessee *Russell v. Thynne*, 6 Law Rec. 269.

(*h*) 11 Anne, c. 2, s. 2, Irish; 4 Geo. II. c. 28, s. 2, English.

(*i*) Lessee *Stuart v. Smith*, Batty, 316; Exch. Easter, 1820, MSS.

(*j*) Lessee *Hawkshaw v. Sutter*, Batty, 319, note.

(*k*) Lessee *Harris v. Prendergast*, 2

Fox & Sm. 355, and the note; and see 2 Howard's Exch. Pr. 65.

(*l*) Lessee *Ryall v. Keane*, Batty, 316, note; Exch. Mich. 1817.

(*m*) Lessee *Rogers v. Blazeby*, Batty, 321, note; Exch. Mich. 1822.

(*n*) Lessee *Stuart v. Smith*, Batty, 316; and see *Blennerhassett v. Day*, 1 Ball & B. 124.

evicted, or some interest(o) derived out of it, was vested in such third person, and that the mere general allegation of interest in the affidavit of service was not sufficient evidence for that purpose.

35. In a subsequent case the Exchequer held, that an undertenant taking defence should not be permitted to object to the affidavit(p), because it shewed an irregular service on himself, unless by the production of his own lease, or title in evidence, he proved that he was assignee of the whole term in the entire, or in some part of the premises, and that he could not rely merely on an underlease, or on the fact of his occupation, as a ground of nonsuit. Upon an ejectment for non-payment of rent, the defendant, who had been duly served, proved that the original(q) lease of the premises was devised to him and to his three brothers as tenants in common, and that two of his brothers were living, and had not been served: but it was shewn, that the defendant had the exclusive possession, and had alone paid the rent for ten years past, and on a motion to enter a nonsuit, the Exchequer ruled there was sufficient ground for presuming that the whole interest in the lease had been assigned to the defendant.

In a replevin suit it appeared, that Lord Lansdowne, in 1788, demised to Gerald Butler and his heirs *pur auter vie*, and that the lessee died in 1797, leaving Edward Butler his heir at law, who was then absent in the East Indies, and did not return until August, 1800: in Michaelmas Term, 1798, after the death of the lessee, and during the absence of Edward Butler, an ejectment(r) for non-payment of rent, at the suit of Lord Lansdowne, was served upon the occupying tenants of the demised premises, and by the affidavit of service, the process-server stated he knew of no other person interested in the lands, save the persons served, except Edward Butler, who was then in the East Indies, and had no residence in Ireland: Lord Lansdowne having obtained judgement in March, 1799, executed his writ of possession, and demised part of the lands to Dunne, the plaintiff in replevin: it did not appear that any order for substitution of service of the ejectment on Edward Butler was obtained: in June, 1801, the lands in Dunne's possession were distrained for rent by Edward Butler, and upon a plea of *non tenuit*, judgement was given by the King's Bench in the avowant's favour, grounded on the general practice in Ireland as to affida-

(o) Lessee Bradshaw v. Cranley, Batty, 324; Exch. East. 1822.

(p) Lessee Gore v. M'Loughlin, Batty, 323, note, Exch. Mich. 1826.

(q) Lessee Kennedy v. Phelan, Batty, 320, Exch. Mich. 1820; Lessee Rogers

v. Blazeby, Batty, 321, Exch. Mich. 1822; Doe *dem.* Rutledge v. Jennings, 3 Irish Law Rep. 268, C. B.

(r) Dunne v. Butler, 2 Huds. & Br. 179, note, Mich. 1805.

vits of service in ejectment, and not upon any privilege which *beyond sea* might claim. By the desire of the Court, this case upon the record, and, much to the regret of Lord Downes(*s*) brethren, was not subjected to the revision of a Court of Appeal.

36. Many inconvenient consequences resulted from holding an affidavit of service to be part of the landlord's *title*, for if it appeared on such affidavit, that the declaration(*t*) and notice had not been served upon, or had been defectively served upon the tenant in possession, if it were shewn on the trial, that a person having the legal estate in the whole, or in any part(*v*) of the demised premises, whether in possession or in reversion, had not been duly served, the action could not be maintained; and where the demised premises were let to trustees for a term of years, both of whom were dead, and administration was taken out to the effects of the survivor, though none of the trustees ever entered, the landlord was wholly deprived of his statutable remedy by ejectment for non-payment of rent, and if he were suffered to obtain judgement by default, he might be treated as a trespasser by the person having the legal estate in the premises, or by any personal representative(*y*) who should be set up to such estate as trustee.

Upon the trial of an ejectment on the title, for the lands in the county of Cork, it appeared(*z*), that by indenture dated 1st of August, 1795, Lord Lismore demised to Daniel Callaghan and his heirs, the lands in question for three lives, rendering rent: the will of the testator, by his will duly attested, devised as follows: "I leave to my executor my interest in the lands of Shronebehy and Derry, to be used for paying the twenty pounds a year left to my sisters, and for other purposes as they shall think fit, which they are to have when they think convenient, to the eldest sons of my sons Michael and Daniel Callaghan, to be used by them, share and share alike, in full benefit of survivorship: I appoint my sons, Michael and Daniel

(*s*) *Nugent dem. Keane v. Ld. Bantry*, 2 Huds. & Br. 182; and see 2 Howard's Exch. Pr. 64. Mr. Howard was an attorney in extensive business, and it cannot be supposed, that if the refinements as to the service of ejectments for non-payment of rent existed in his time, they should have entirely escaped his observation.

(*t*) *Lessee Ryall v. Keane, Batty*, 316, note.

(*u*) *Lessee Rogers v. Blazeby, Batty*,

321, note.

(*v*) *Lessee Bradshaw v. Craighy*, 325, note; *Jones dem. Co. Haynes*, 2 Fox & Sm. 361.

(*x*) *Jones dem. Callaghan v. more*, 2 Huds. & Br. 178, note.

(*y*) *Jack dem. Gough v. Shi* Exch. Easter, 1809.

(*z*) *Jones dem. Callaghan v. more*, 2 Huds. & B. 178, note Exch. Mich. 1821.

laghan, and my brother-in-law, Denis M'Carthy, as executors to this my will, fully empowering them to dispose of all my personal property for the payment of my debts, and leaving them full power to use every part of the property herein willed (my wife's jointure only excepted), until the last of my debts are paid:" the lessee died in May, 1811, and the executors having renounced, administration with the will annexed was, in April, 1815, granted to Callaghan O'Callaghan, one of the testator's sons: upwards of a year's rent being in arrear, Lord Lismore, as of Easter Term, 1816, brought his ejectment for non-payment of rent, which was duly served on Michael and Daniel Callaghan, two of the executors named in the will, and also upon Callaghan O'Callaghan, the administrator of the lessee, and upon all the occupying tenants of the demised premises, but it did not appear to have been served on Denis M'Carthy, who was one of the executors named in the will, nor on Michael and Daniel Callaghan, the testator's grandsons and devisees, who were infants. Defence was taken by an undertenant of part of the premises, who gave a consent for judgement, and on the 7th of December, 1816, the writ of possession was executed: the counter-ejectment was brought as of Hilary Term, 1819, and contained demises in the names of the persons who were appointed by the will executors, and of the testator's grandsons and devisees, who were infants: a verdict was given by consent for the plaintiff, subject to the following points: *first*, that the ejectment for non-payment of rent was an eviction, though neither the third executor, Denis M'Carthy, nor the infants Daniel and Michael were served; *secondly*, that service of two out of three joint-tenants was sufficient, and that the minors need not be served; *thirdly*, that the two trustees served were bound: it appeared on the trial, that Denis M'Carthy never interfered in the trusts of the will, and upon the argument of the points saved, it was contended that the infants only took equitable interests(*a*) in the demised premises under the will, and that service on them was unnecessary; and if any estate vested in the persons nominated as executors, they took as joint-tenants, and that service on one joint-tenant was(*b*) sufficient for his companions; and that the persons who were appointed executors having declined to accept the trust, the legal estate in the demised premises devolved upon the administrator with

(*a*) See *Blennerhassett v. Day*, 2 Ball & B. 124, by Lord Manners.

(*b*) *James dem. Sullivan v. Walsh*, 1 Jones, 264; see *post*; *Doe dem. Bailey v. Roe*, 1 Bos. & Pull. 369; *Doe dem.*

Gaskell v. Roe, 3 Tyrw. 84; *Doe dem. Bromley v. Roe*, 1 Chitty's Rep. 141; *Doe dem. Hutchinson v. Roe*, 2 Dowl. Pra. Ca. 418.

the will annexed as *special occupant*, and the service on him defeated the lease: however, the Exchequer ruled the points in favour of the claimants, and decided that there had not been a valid eviction of the interest.

It was also decided by the Exchequer, that persons having estate in remainder derived under a lease of demised premises, could not be barred by a judgement in ejectment for non-payment of rent, unless duly served. An ejectment on the title having being tried at the Lent Assizes for 1809, before O'Grady, Chief Baron, the plaintiff obtained(c) a verdict: and upon a motion for a new trial, it appeared that Sir H. Cavendish demised the lands of Carrigparson, in the Liberties of Limerick, to Thomas Gough and his heirs, for three lives renewable for ever, at the yearly rent of £310; and, by indenture dated the 13th of November, 1763, the lessee upon his marriage limited his interest in the lease to trustees and their heirs, to the use of the lessee, Thomas Gough, for his life, with remainder to John Napper and Arthur Baillie, for a term of 300 years, to commence *upon the death* of the lessee, Thomas Gough, and subject thereto, to the use of the first and every other son of the intended marriage successively in tail-male, and in default of such issue, to Thomas Gough and his heirs: the trusts of the term were declared to be for the purpose of raising £2000 for the daughters and younger children of the marriage: this deed was registered shortly after its execution; and in the year 1763, John La Touche purchased the rent and reversion of the demised premises: Arthur Baillie having died, and upwards of a year's rent being in arrear, John La Touche, as of Easter Term, 1784, brought his ejectment for non-payment of rent, which was duly served on Thomas Gough, and on his undertenants, who were in the occupation of the lands: Thomas Gough having taken defence, judgement was entered upon his consent, and on the 15th of December, 1784, the writ of possession was executed, and in the year 1788, John La Touche demised the lands to the defendant, Roger Shine, for three lives: Thomas Gough, the lessee, died in the year 1804, leaving three daughters, his only issue, and devised his estate to his nephew, Richard Franklin Gough. John Napper, the surviving trustee of the term, never acted in the trust, and it did not appear he was served with the ejectment: he died soon after the testator, and shortly previous to bringing the ejectment *on the title*, Daniel O'Brien procured administration to the effects of the trustee: *cestuique vies* in the original lease to Thomas

(c) Jack *dem.* Gough v. Shine, MSS. Exch. Easter, 1809.

well as in the defendant's lease, were in being : the Chief Justice, in his judgment merely said, it had often been decided that a tenant having any legal estate, either in possession or in reversion, could not be served with an ejectment for non-payment of rent ; and that, where years had elapsed since the death of the lessee, Thomas Jones, and the trust-term commenced in possession, there was no legal presumption on the subject, and that the application was granted with costs. A bill was then exhibited by Roger Shine to be quieted in his possession of the demised premises, and (d) upon proof that the trusts of the term for years had long before been satisfied by John La Touche, a perpetual lease was awarded with costs.

A case which was decided before, though not reported until after the preceding decision of the Exchequer, Lord Redesdale expressed his opinion, that the (e) proviso in the Ejectment Acts saving the rights of infants, did not extend to infants having only a title in reversion in demised premises, because by the common law, the entry of a writ on the tenant for life of a leasehold interest, for breach of covenant, re-vested the property in the landlord, in the same manner as if no lease had been granted, and therefore avoided all objections. So the House of Lords, upon appeal, reversed the judgment of the Exchequer (h), after a lapse of *twenty* years, granted relief against an eviction for non-payment of rent of interest, which was vested in infants in remainder : the cause was decided on the ground, that the infants being entitled to an estate under the lease, their rights were saved by the Ejectment Acts. But both Lord Eldon and Lord Redesdale decided (i), that tenants in remainder, or reversion, need not be served with an ejectment for non-payment of rent, and that a Court of Equity ought to set aside a judgment in ejectment for a forfeiture, merely on account of a supposed irregularity in the proceedings at law.

The Court of King's Bench afterwards re-considered the principle of the preceding decisions respecting the service of ejectment, and after very elaborate discussion, materially modified them, and they have not altogether over-ruled the Exchequer deci-

Gough, 1 Ball & B. 436.
s. v. Lord Bandon, 2 Sch.
the note.

, c. 2, s. 8, Irish ; 4
s. 8, Irish ; both clauses re-
lish Statute, 56 Geo. III.

(g) 1 Ro. Abr. 474, Condition, P. pl.
1 and 2 ; Co. Litt. 202, A. ; Warren v.
Lee, 2 Dyer, 126, B. plac. 54.

(h) Morgans v. Baker, in the Exche-
quer, 9th June, 1809.

(i) Baker v. Morgans, 2 Dow's Parl.
Ca. 526.

sions on the same subject. The King's Bench ruled(*j*), that a defendant who appears on the trial of an ejectment for non-payment of rent cannot set up as an available defence, either defective service, or non-service of the ejectment on himself, because such an irregularity in service of the *process* is waived by the defendant's appearance; and in a subsequent(*k*) case, though the Court declined deciding the question whether a defendant could take advantage of a defective service upon a *third person*, who had the legal estate under the lease, yet it was observed by one of the learned judges(*l*), that a person defectively served and not taking defence, might apply to the Court for relief; but where such third person did not complain, it seemed extraordinary to allow another party to raise the objection, not as a ground of irregularity, but of non-suit. There is no substantial difference in respect of the service of ejectments between(*m*) the English and Irish Statutes on this subject, and no express provision is contained in either code, requiring that service should be effected on the person in whom the legal interest in the lease is vested: if the service of the ejectment, which is substituted by the Statutes for the common law demand, is to be regulated by analogy to the procedure at common law, then the summons in ejectment need only be served upon the tenants in possession of the land, and there is no authority for imposing on the landlord the necessity of serving a new class of persons, the consequence of which undoubtedly has been to neutralize the benefit, and defeat the policy of the Ejectment Acts.

In an ejectment on the title, it appeared that Edward Croker, being seised in fee, demised(*n*) to John M'Donnell for 999 years, at the yearly rent of £28, and the lessee, by deed duly registered, assigned the demised premises in mortgage to Michael Byrne; by indenture dated in May, 1811, the personal representatives of the original lessee, and the mortgagee, assigned their estates under the lease to George Fox and Robert Mayne, upon certain trusts: Francis Fox, the *cestuique* trust, entered into possession with the consent of the trustees, and Robert Mayne, who was the surviving trustee, died, leaving Mary Mayne his sole executrix, who obtained probate of his will. Upwards of a year's rent being in arrear, the lessor brought his ejectment for non-

(*j*) Lessee Hawkshaw v. Sutter, *Bat-ty*, 319, note, K. B. Mich. 1819.

(*k*) Lessee Alcock v. Doyle, *MSS. Trin.* 1824, K. B.; 2 Fox & Sm. 362, note.

(*l*) Judge Jebb.

(*m*) 11 Anne, c. 2, s. 2, Irish; 4 Geo.

II. c. 28, s. 2, English.

(*n*) Reynard *dem.* Mayne v. Croker, *Cooke & Alc.* 12; Lessee Hamilton & Montgomery, 4 *Law Rec.* 56, 2nd series; Lessee Assignees of Pepper and Locke & Newenham, 4 *Law Rec.* 155, 2nd ser.

payment of rent, which was served on Francis Fox, and upon the several tenants in possession of the premises, and having obtained judgment, on the 6th of February, 1827, executed his writ of possession: on the 1st of October, 1832, the counter-ejectment was brought, on the demise of Mary Mayne, for the purpose of invalidating the former eviction, because the personal representative of the surviving trustee, whom the legal estate in the lease was vested, had not been served with the ejectment for non-payment of rent, but the King's Bench decided it was unnecessary to serve a person out of possession, though such person had the legal estate in the land demised.

39. Where a lease for years, rendering rent, was assigned upon marriage(o) to trustees, the survivor of whom died in the year 1783, testate, and neither of the trustees ever entered into possession, it the persons beneficially interested under the settlement continued to hold the premises pursuant to its provisions. Upwards of a year's rent being in arrear, the landlord, the Earl of Bantry, obtained judgment in ejectment for non-payment of rent, and on the 17th of December, 1816, executed his writ of possession. In the year 1822 Charlotte Keane obtained administration of the effects of the surviving trustee, and shortly afterwards a counter-ejectment on the title was brought on her demise, as such administratrix, to recover back the demised premises: a verdict having been found in her favour, the King's Bench, upon a bill of exceptions, held that the original lease had been defeated by the judgment in ejectment, although the personal representative of the surviving trustee never had been served, and that a landlord is not disabled from evicting his tenant's interest for non-payment of rent, because there is no person in existence possessed of the legal estate in the tenant's lease.

40. Robert Purdon, by lease made in October, 1794, demised to Philip Supple the elder, and his heirs for three lives; and the lessee, deed duly registered, dated in October, 1816, assigned his interest in the lease to his son Philip Supple: upwards of a year's rent being due, the lessor, as of(p) Michaelmas Term, 1816, brought his ejectment for non-payment of rent, and by the affidavit of service it was stated, that the summons in ejectment and notice was served on Philip Supple the elder, by delivering the same unto the said Philip Supple's son, at his father's dwelling-house, and directing him to give it to his father: on the 4th of March, 1817, the writ of possession was exe-

(o) *Nugent dem. Keane v. Ld. Bantry*,
Huds. & Br. 156; 1 Huds. & Br.
7, S. C.

(p) *Lessee Supple v. Purdon*, Alc. &
Nap. 137, MSS.

cuted, and in Michaelmas Term, 1831, an ejectment *on the title* was brought by Philip Supple the son, upon the ground that he had not been served with the previous ejectment, and, upon the trial, it was proved that the father, at the time of the alleged service, had several sons : on the part of the defendant, the process-server was produced as a witness, who proved that the lessor of the plaintiff was the identical son of Philip Supple, to whom the ejectment had been delivered. Upon a motion to set aside a verdict found for the defendant, the King's Bench held that the ambiguity in the affidavit of service was properly explained by the parol testimony of the process-server, and that after a lapse of fourteen years there was abundant evidence ^(q) to warrant a presumption, that the ejectment had been duly served on the lessor of the plaintiff.

41. In an ejectment *on the title*, brought for the purpose of impeaching the validity of an eviction for non-payment of rent, it appeared, that John Walsh demised to John Stack for three lives, and that the interest in the lease, by mesne assignments, vested in Fitzmaurice Wall, who, by deed dated the 1st of November, 1816, granted the demised premises in mortgage to John Sullivan and Charles Conyers, subject to redemption on payment of £200. The mortgage was registered ^(r) within six months after its execution, but the memorial did not state either the date of the mortgage-deed, or the day of its execution, or the consideration. Sir John Ben Walsh being entitled to the rent and reversion of the demised premises, and upwards of a year's rent being in arrear, as of Easter Term, 1822, brought his ejectment for non-payment of rent, which was duly served upon Fitzmaurice Wall and his undertenants, and also upon John Sullivan, one of the mortgagees, but was not served upon Charles Conyers, and judgment being entered on the 19th of August, 1822, the writ of possession was executed : neither of the mortgagees ever entered into possession, and the counter-ejectment was brought on their demise, on the ground that the eviction was to be deemed a nullity, in consequence of the omission to serve the ejectment on Charles Conyers. A verdict was found for the plaintiff in the second ejectment, subject to the questions, first, whether the registry of the mortgage was sufficient and secondly, whether service of the ejectment for non-payment of rent on one of the mortgagees was not effectual against the other mort-

(q) *Doe dem. Hitchings v. Lewis*, 1 Burr. 614 ; 2 *Ld. Kenyon*, 320, S. C.

(r) *James dem. Sullivan v. Sir John Ben Walsh*, MSS. Exch. Easter, 1835 ;

1 *Jones's Rep.* 264 ; but see *Jones dem. Callaghan v. Ld. Lisimore*, 2 *Huds. & Br.* 178, note.

gagee, as they were joint-tenants(s). The Exchequer ruled, that the service upon John Sullivan was valid against the other mortgagee and joint-tenant, and without expressing any opinion on the validity of the registry, ordered judgement to be entered for the defendant.

42. The original declaration or summons in ejectment for non-payment of rent being considered by the Queen's Bench merely as process, it follows, that a variance between such process and the second declaration, or the declaration on record, though it may be an irregularity, cannot be treated as any cause of nonsuit: where the original declaration, which was annexed to the affidavit of service, agreed in all respects with the declaration on record, except that one of the demises(t) was laid, in the original summons, on the 10th of November, and in the second declaration on the 6th of November; a verdict being found for the defendant in consequence of the variance, was set aside, because the variance(u) merely amounted to an irregularity, which could not be taken advantage of on the trial. However, in an ejectment for non-payment of rent, where the premises were described in the original declaration as being situate in the parish of St. Mary, and the second declaration was, by leave of the Court, amended, by stating the premises to be situated in Mary's-lane, instead of "in the parish of St. Mary;" upon a verdict for the plaintiff, subject to a point saved on the question of variance(v), the Exchequer directed a nonsuit to be entered, and in giving judgement, Pennefather, Baron, observed, that the declaration on which the plaintiff proceeds to trial must be served upon the defendant, and that the due service of the ejectment is a condition precedent, upon which all the benefits conferred by the Ejectment Acts, both before and after judgement, are made to depend, and that, for the future, no amendment of the record in ejectments for non-payment of rent could be allowed. In an ejectment for non-payment of rent under the English Statute, the demise was laid on a day prior to that on which the right of entry accrued, and the judge at *Nisi Prius* having amended the record, by substituting the day on which the right of entry(w) was complete, after verdict for the plaintiff, on motion that a nonsuit should be entered pursuant to leave reserved, the Court held, that on the amendment being made, the declaration is to

(s) *Doe dem. Bromley v. Roe*, 1 Chit. Rep. 141.

(t) *Lessee Harris v. Prendergast*, 2 Fox & Sm. 345; but see *Anon.* 4 Law Ec. 201.

(u) *Bass v. Bradford*, 2 Ld. Raym. 411.

(v) *Lessee Russell v. Thynne*, 6 Law Rec. 269; *Lessee Allen v. Smith*, 1 Jones's Exch. Rep. 279; and see *Henderson v. Dickson*, Irish Circ. Rep. 55.

(w) *Doe dem. Edwards v. Leach*, 3 Mann. & Gr. 229; 3 Scott's N. R. 509; 9 Dowl. Pr. C. 877.

be considered as having always been in its amended form, and that the consent rule was to be taken as applicable to it.

43. The Statutes(*x*) of the 11 Anne, c. 2, and the 4 Geo. I. c. 5, save the right of any mortgagee of the lease, or any part thereof, by the 8 Geo. I. c. 2(*y*), the lessee and mortgagee, and their *respective* assignees, who shall be duly served with the ejectment, are barred unless such mortgagee, or his assignee, within nine months after execution executed, pay, or tender to the landlord, the rent in arrear and costs; provided(*z*) that every mortgage of any *lease*, and every assignment thereof, shall be registered within six calendar months after perfection thereof, and in default of registering such mortgage or assignment in manner aforesaid, the landlord may proceed and obtain execution, although such mortgagee or assignee were not served with the ejectment. Lord Redesdale observes(*a*), that this latter Statute applies to assignees of all descriptions (including assignees of the lease, as well as of the mortgage), and that all such property is put in a very precarious situation by the terms of the Statute, if those who have the actual interest do not register in six months. Although the landlord has express notice of an unregistered mortgage affecting the demised premises, it is not requisite, at law, that the ejectment should be(*b*) served on the mortgagee, if not in possession, but a landlord, who is aware of the existence of a mortgage of the lands, though unregistered, without giving notice of his proceedings to the mortgagee, is considered as acting in violation of equitable principles, and the mortgagee may establish his right to be relieved, in Equity, against the eviction.

44. It is extremely difficult to ascertain, with any degree of precision, from decided cases, who are the necessary parties to be served with an ejectment for non-payment of rent, in order to render an eviction complete and absolute, in default of redemption within the prescribed periods: while the law on this subject continues in its present unsettled state, it will be expedient for a landlord seeking to evict his tenant's lease for a forfeiture, by reason of non-payment of rent, to cause every person in possession, or in receipt of the rents and profits, or having any mortgage of, or legal estate in, the whole, or any part of the demised premises, to be served with the ejectment,

(*x*) 11 Anne, c. 2, s. 3, Irish; 4 Geo. I. c. 5, s. 5, Irish.

(*y*) 8 Geo. I. c. 2, s. 4, Irish.

(*z*) 8 Geo. I. c. 2, s. 5, Irish; a mortgagee by the English Statute, 4 Geo. II. c. 28, s. 3, is allowed six months to redeem.

(*a*) *Biddulph v. St. John*, 2 Sch. & Lef. 534; but see *Reynard dem. Mayne v. Croker*, Cooke & Alc. 12, by Burton, J.

(*b*) *Biddulph v. St. John*, 2 Sch. & Lef. 533.

such service cannot be regularly effected, to apply to the service which he was able to make, shall be deemed that some other mode of service shall be substituted.

It has been decided by the Queen's Bench, that an intermediate person (d) out of possession, having a legal estate in fee simple, though not served, cannot treat an eviction for non-payment of rent as a nullity, and obtain restitution, or recover back the rent; nor can a person, after taking defence (e), successfully insist on non-service, or defective service, either of himself or of his estate; nor is it necessary to serve a person having an estate in fee simple, or reversion; nor will a landlord's right to sustain an action for non-payment of rent be suspended or defeated because notice (g) has not been obtained of the effects of a lessee for years, if the occupying tenants have been duly served. The law, however, still continues to hold that a defendant may be ejected for non-service, or defective service of the ejectment, either on himself or on a third person, if it be proved, that the original lease of the premises is not defeated, and the right to the rent and reversion is vested either in himself or in such person; but that non-service, or defective service of the heir (h) of a lessee of a freehold lease, or of the co-devisees of the interest in the premises, is no ground of nonsuit, where the defendant, or a party claiming exclusive possession of the premises for several years. Though persons holding legal estates in demised premises are not served, it is not requisite that persons claiming title paramount to the lease, or competitors for the reversion, be served: where the right to the rent and reversion of the premises is contested between an heir and devisee, if either is ejected by ejectment (j) for non-payment of rent, the other need not be served, and the lessee ought, for his own protection, to file a bill of interpleader in order to compel the claimants to assert their rights.

See the Irish Statute (k), 56 Geo. III. c. 88, s. 14, the clauses

Hamilton v. Montgomery, 2nd series.

dem. Mayne v. Croker, 12; *Lessee Assignees v. Newenham*, 4 Law

Warkshaw v. Sutter, Bat-

rs v. Ld. Bandon, 2 Sch. *ker v. Morgans*, 2 Dow's

lem. Keane v. Ld. Ban-

try, 2 Huds. & Br. 156.

(h) *Lessee Rogers v. Blazeby*, Batty, 321; *Doe dem. Rutledge v. Jennings*, 3 Irish Law Rep. 268.

(i) *Lessee Kennedy v. Phelan*, Batty, 320.

(j) *Lessee Keatinge v. Ejector*, Batty, 431; *Lessee Trustees of Jackson's Charities v. Jackson*, 2 Law Rec. 36-44, 2nd series.

(k) 56 Geo. III. c. 88, s. 14, Irish.

in the prior(*l*) Ejectment Acts saving the rights of infants, women, persons of unsound mind or resident out of the jurisdiction are repealed; copies of the summons and notice in ejectment therefore, to be served on such persons, or service, when it must be substituted on them by an order of the Court for that purpose.

47. Where lands lying in different counties are comprised in a lease, subject to a single rent, separate ejectments for non-payment of rent must be brought for the land situate in each county(*m*), and in the trial of each ejectment, a compared copy of the affidavit of the ejectment on the lands in the other county, must be produced in evidence, in addition(*n*) to the ordinary proofs, for the purpose of shewing an entry for the forfeiture on the whole of the demises.

(*l*) *Lessee Supple v. Raymond, Hayes*, 6, affords a remarkable illustration of the propriety of such repeal.

(*m*) See *Co. Litt.* 153, B., 154, A., 262, B.; *Bro. Abr. Assize*, pl. 76; *No-*

ris v. Connesbrooke, Year Hen. VI. fo. 9; *Bulwer's case* and 4, A.

(*n*) *Lessee Caulfield v. Mansfield*, MSS.

CHAPTER X.

NON-PAYMENT OF RENT.

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| <p>48. <i>The Relation of Landlord and Tenant must be subsisting.</i></p> <p>49. <i>Lands holden in Fee-farm.</i></p> <p>50. <i>Ejectment lies only while Reversion is retained.</i></p> <p>51. <i>What Reversion sufficient.</i></p> <p>52. <i>Where Lessor parts with immediate Reversion.</i></p> <p>53. <i>Trust-term for Years not available as a common Law Demise, before Entry.</i></p> <p>54. <i>Statutable Remedy defeated by any Act which would defeat Re-entry at common Law.</i></p> | <p>55. <i>Where a Lease operates as a Grant of the Reversion in Parcel, and of the Residue in Possession.</i></p> <p>56. <i>Conditions not apportionable by Act of the Party.</i></p> <p>57. <i>Jack dem. Purcell v. Kirby.</i></p> <p>58. <i>Whether a new Remedy created by the Ejectment Acts.</i></p> <p>59. <i>Condition suspended by Eviction of Tenant from Parcel.</i></p> <p>60. <i>Condition of Re-entry defeated by Alteration in its Extent or Quality.</i></p> |
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48. AN ejectment for non-payment of rent can only be maintained while the relation of landlord and tenant is subsisting, and does not lie where such relation never was(*a*) created, or having once existed, had been determined before bringing the ejectment. This principle, though well established, is not free from difficulty in its application: it is to be considered whether a grant of lands in fee-farm(*b*), at a specified rent, creates the relation of landlord and tenant between the parties, so as to enable the grantor to support an ejectment for non-payment of rent, or whether the rent reserved on such a grant is not in effect merely a rent-charge(*c*): all existing fee-farm grants of land in Ireland were made long after the introduction of the Statute of "*Quia Emptores*," as a branch of Irish law; but any proprietor holding lands in fee-simple under letters patent, had, and still has a right, *by license from the Crown*(*d*), to grant part of his estates to be holden of himself in fee-farm. Upon the settlement of the escheated counties in Ulster, the undertakers, or settlers, were expressly authorized by the articles of plantation, to erect manors, to hold Courts Baron, and to create tenures to hold of themselves, and by the letters patent granted in pursuance of these articles, the several allotments of the undertakers were

(*a*) Lessee Black v. Davis, Batty, 80-101; Lessee Bonham v. Doyle, Batty, 171.

(*b*) See the note of the reporters to The King v. Wilson, 5 Mann. & Ry. 153; and see the opinion of Judge Bur-

ton in Alc. & Napier, 259.

(*c*) See Hargrave's note, 235, to Co. Litt. 143, B.

(*d*) Bac. Abr. Tenure, B.; Bro. Abr. Tenures, 261, plac. 65; 2 Inst. 501.

constituted manors, and the patentees were empowered to reserve tenures to hold of themselves as of their manors, and were expressly bound to grant a specified proportion of their estates in fee-farm: grants of various other manors were made by the Crown in different parts of Ireland, enabling the owners to create similar tenures, and all the patents containing such grants were confirmed(*e*) by Statute: before the enactment of the Statute prohibiting(*f*) subinfeudation a lord who granted lands in England to hold of himself in fee-simple, subject to the performance of services, retained a seignory(*g*) which conferred on him a right to fealty, and to have the lands restored to him, or his heirs, upon failure of heirs of the grantee: this right, though called an *escheat*, was, in strictness, a reversion. A lord of an Irish manor granting lands in fee-farm to hold of himself, pursuant to the provisions of his letters patent, retains a seignory, and is entitled to the same incidents of tenure, such as fealty and escheat, which would have been retained under a similar grant of lands in England made prior to the Statute of "*Quia Emptores*." Hence it is to be inferred, that a grant in fee-farm, made under such circumstances, constitutes the relation of landlord and tenant between the parties and their real representatives, and that the rent reserved on such a tenure is a rent-service, and that such a fee-farm grant may be defeated(*h*) for non-payment of rent, by the lessor or his heirs under the Ejectment Acts.

49. The relation of landlord and tenant is not created by a grant of lands to hold in fee-farm, unless(*i*) warranted by the express provisions of the original patent, and the rent reserved payable to the grantor on such a conveyance, if not authorized by the Crown-grant, is a rent-charge, and not a rent-service: it was decided upon a bill of exceptions, that the estate conveyed by a grant of lands in fee-farm(*j*) was not defeated by reason of an eviction for non-payment of rent, and on a counter-ejectment brought after a lapse of eighteen years, the persons deriving under the grant in fee-farm, recovered back the possession.

(*e*) See *Doe dem. Lowes v. Davidson*, 2 M. & Selw. 184; by Lord Ellenborough.

(*f*) 18 Edw. I. stat. 1, c. 1, English and Irish.

(*g*) See the learned opinion of Judge Burton on this subject; Alc. & Nap. 259; *ante*, Book 2, c. 8, No. 4.

(*h*) Upon judgement of ouster in a writ of *cessavit* for non-performance of services, the lord is said to be in of his

reversion; Fitzh. Nat. Brev. 208; see *Lessee Orr v. Stephenson*, 5 Irish Law Rep. 1.

(*i*) Hargrave's note, 235, to Co. Litt. 143, B.; 3 Prest. Abst. 54; Co. Litt. 12, B.; but see the note of the reporters to *The King v. Wilson*, 5 Mann. & Ry. 156.

(*j*) *Brown dem. Bond v. The Trustees of Sterne's Charities*, Batty, 87-100.

tenant holding lands by lease for a life or lives, conveys for the same(*k*) life or lives, reserving a profit rent, or if a lessee of lands for a term of years, grants them for a period exceeding the duration of his own estate, reserving a profit rent, ever may be the form of the grant, the conveyance will take the effect of an assignment of the interest, and not as an underlease, but to create the relation of landlord and tenant between the parties. It was decided by the House of Lords(*l*), that the existence of a reversion immediately expectant on the term demised, is required to create the relation of landlord and tenant, and the Queen's Bench(*m*), that in order to sustain an ejectment for non-payment of rent, there must be a rent-service, which can only be incident to a lease, and that there was no substantial distinction, in this respect, between the case of a general avowry in replevin, and an ejectment for non-payment of rent.

In the other case, the Exchequer held(*n*), that although a party could not maintain a general avowry for rent, without a reversion, yet that an ejectment would lie for non-payment of rent where the parties, by their agreement, provided, as a remedy between themselves, that the relation of landlord and tenant(*o*) should subsist, and where a condition of re-entry was reserved for non-payment of rent; but the same Court, in reversing all the cases on the subject, have since concurred with the Bench in holding, that an ejectment for non-payment of rent does not lie, where the lessor of the plaintiff does not retain a reversion.

A lease made by a tenant from year to year, to hold from year to year, or for a term(*r*) of twenty-one years, rendering rent, is, in effect, a lease for such period, during the continuance of the holding.

l *v. Lord Lexington*, 1 P. 10; *Palmer v. Edwards*, 1 Doug. 10; *Hicks v. Downing*, 1 Lord 10; *Parmenter v. Webber*, 8 2 Moore, 656; *Thorn v. B. & Adol.* 586.

o *v. Digges*, 5 Bligh's Parl. 10; *ow. & Cla.* 180; 2 Huds. 10; *Rankin v. Newsam*, 1 70.

p *Fawcett v. Hall*, Alc. & 10; *th Judge Burton's opinion*

dem. Walsh v. Feely, 1 10. Rep. 413.

dem. Morrison v. Little, 10. 489; *Eaton dem. Greene*

v. Keller, Huds. Comm. 586; 1 Hogan, 437, in the note; *Lessee Coyne v. Smith*, Batty, 90; *Hogan v. Fitzgerald*, 1 Huds. & Br. 77; *Baker v. Gostling*, 1 Bing. N. C. 19; 4 Moo. & Sc. 569; and see the reporter's note in 5 Mann. & Ry. 157.

(*p*) *Lessee Porter v. French*, Exch. 12 June, 1844.

(*q*) *Pike v. Eyre*, 9 B. & Cr. 909; 4 M. & Ry. 661; *Peirse v. Sharr*, 2 M. & Ry. 418; *Curtis v. Wheeler*, Moo. & Malk. 493.

(*r*) *Mackay v. Mackreth*, 4 Doug. 213; 2 Chitty's Rep. 461; *Sparks's case*, Cro. Eliz. 676; *Hetley*, 73; *Moor*, 569.

of the immediate lessor, unless the landlord's tenancy shall previous be determined by notice to quit, thereby leaving a reversion suffice to sustain an ejectment for non-payment of rent, provided the undertenant derives under an instrument in writing ascertaining the rent. was observed by Sir William Mac Mahon, that if the titles of landlord and tenant are both equitable, consisting of *articles*, the landlord may recover under the Ejectment Acts(*s*), though there can be no reversion at law, both the estates being, in legal contemplation, only tenancies from year to year. This opinion is confirmed by the decision(*t*), that a tenant in possession, under an executory agreement for an intended lease, which, it was stipulated should contain a proviso of re-entry, holds upon the terms of the intended lease, and that the proviso is applicable to the yearly tenancy.

52. It is requisite not only that the relation of landlord and tenant shall be created by the demise, but that such relation shall be subsisting at the time of bringing the ejectment; for if it appear that the lessor, prior to the commencement of the suit, assigned his reversion in the demised premises, by way of mortgage, or otherwise, and that there was no subsequent recognition of the lessor's title, by payment of rent, the ejectment cannot be supported. One Davis, after having demised to Black for fifty-one years, by deed dated in July, 1822, granted his reversion, subject to the lease, to Elizabeth Price, by way of mortgage: a year's rent, ending in May, 1823, afterwards became due(*u*), and Davis, as of Trinity Term, 1823, on his own demise solely, brought his ejectment for non-payment of rent, and having obtained judgement by default, in December, 1823, executed his writ of possession. In the year 1825, Black brought his counter-ejectment to recover back possession of the premises, insisting that, upon the execution of the mortgage, Davis ceased to be landlord, and that the eviction could not be sustained. After verdict for the defendant, the King's Bench decided that the lessor of the plaintiff was not precluded by the judgement from controverting the existence of the relation of landlord and tenant at the time of bringing the first ejectment, and ordered judgement to be entered in his favour, pursuant to leave reserved. Upon a former ejectment between the same parties(*v*), the Common Pleas arrived at a different conclusion, by holding that the judgement in ejectment for non-payment of rent was conclusive; not only that the rent was due, but that

(*s*) 25 Geo. II. c. 13, Irish; Shenton v. Corbally, 1 Hogan, 439.

(*t*) Doe *dem.* Thomson v. Amey, 12 Ad. & Ell. 476; 4 P. & Dav. 177, S. C.

(*u*) Lessee Black v. Davis, Batty, 80.

(*v*) Lessee Black v. Davis, Batty, 80-102.

the relation of landlord and tenant was subsisting when the first ejectment was brought.

On the trial of an ejectment for a forfeiture incurred for non-payment of rent, and by breaches of other covenants, it was proved^(w) that after the execution of the lease, the lessor conveyed his estate in the leased premises, by way of mortgage; and as it was not shewn that the tenant had subsequently paid any rent, the Court held that the landlord was not entitled to recover. The same principle was applied in a case, where it appeared that one Thomas Fuller Hartnett, being seised in fee, demised to John Power, for the lives of the lessee and of two other persons, and afterwards, by his will, devised his rent and reversion^(x) to his eldest son, James Hartnett, for his life, with remainder to his first and every other son successively in tail, with remainder to the testator's second son. The testator and his eldest son having died, Thomas Hartnett the younger, who was the only son of James Hartnett, being seised in tail under his grandfather's will, by indenture dated in April, 1811, conveyed the lands to the lessee, John Power, and his heirs for ever. Thomas Hartnett the younger, having died without issue, the lessor of the plaintiff, who was the testator's second son, became entitled under the testator's will, and brought his ejectment for non-payment of the rent reserved by the lease made to John Power; and the Court held that the lease for lives was merged^(y) in the estate conveyed by the deed of April, 1811, to the lessee, and being annihilated by such union, that the relation of landlord and tenant had ceased to exist between the parties, and that the ejectment could not be supported.

An absolute conveyance of the reversion of lands by a landlord, subject to a lease, whether he assigns the arrears of rent then due to the purchaser, or retains them for his own benefit, will defeat the landlord's right of entry; and, after execution of the conveyance, an ejectment will not lie^(z) for non-payment of such arrears of rent, in the name of the vendor, because he does not retain any right of entry; nor in the name of the purchaser, because the right to enter for a condition broken prior to the conveyance is incapable of being transferred: the relation of landlord and tenant is put an end to, so far as regards such arrears, by means of the conveyance, and no such relation existed

^(w) Doe *dem.* Marriott *v.* Edwards, 5 B. & Ad. 1065; 3 Nev. & Mann. 193; Carr. & P. 208, S. C.

^(x) Lessee Hartnett *v.* Coughlan, 2 Cox & S. 368.

^(y) See Machell *v.* Clarke, 2 Ld.

Raym. 778; 2 Salk. 619; 7 Mod. 18; Com. Rep. 119; Butler's note, 286, to Co. Litt. 331, A.

^(z) Blennerhassett *v.* Day, 2 Ball. & B. 125-135; Flight *v.* Bentley, 7 Simons, 149; Dixon *v.* Harrison, Vaugh. 40.

between the purchaser and the tenant, when the arrears of rent fell due : however, an equitable agreement to convey to a purchaser will not deprive the vendor of his remedy by ejectment(*a*), for recovery of rent which became due prior to the contract.

53. It has been the subject of much discussion, how far a term for years, limited to a mere trustee, who never entered into possession, or accepted the estate, can be used as an outstanding term, to the prejudice of a subsequent *bond fide* incumbrancer : a person having avowed the caption of certain goods as a distress for the arrears of a rent-charge, the plaintiff in replevin pleaded, that prior to the grant of the rent-charge to the avowant(*b*), the owner of the estate by indenture granted a rent-charge out of the premises to a third person, for a term of years then subsisting, and for better securing the payment of such prior rent-charge by the same deed granted, bargained, sold, and demised the premises to one Fletcher, for a term of ninety-nine years, and that a sum of £2000 was due for arrears of such prior rent-charge at the time of making the distress : a general demurrer to this plea having been over-ruled by the King's Bench, the Court of Exchequer Chamber, upon a writ of error, decided, that in order to give an estate to Fletcher, the grant must be construed, either as a demise at common law, or as a bargain and sale under the Statute of Uses, and that the grant could not be deemed a lease for years, as it was not alleged that Fletcher ever entered under the demise, or that he ever accepted the estate by executing the deed, or by any act equivalent to entry, and therefore could only be treated as an *interesse termini*, and although Fletcher had a right to elect to claim the estate under the deed, either as a common law demise, or as a bargain and sale, yet the plaintiff in replevin, who was a stranger to the grant, was not competent to elect for Fletcher in which way the deed should operate, and the judgement of the King's Bench was reversed.

54. The Statute of 11 Anne, c. 2(*c*), requires that a landlord shall have power by law to re-enter, and the subsequent Ejectment(*d*) Acts, dispensing with the necessity of a clause of re-entry in a lease or equitable article, only enable the landlord to proceed in such and the same manner *as if a condition of re-entry had been contained in such lease or instrument, and not otherwise* : hence it follows, that

(*a*) *Blennerhassett v. Day*, 2 Ball & B. 135.

(*b*) *Miller v. Green*, 8 Bing. 92 ; 1 Moo. & Sc. 199 ; 2 Tyrw. 1 ; 2 Cro. & Jerv. 143.

(*c*) 11 Anne, c. 2, s. 2, Irish ; 4 Geo. II. c. 28, s. 2, English.

(*d*) 5 Geo. II. c. 4, s. 1, Irish ; 25 Geo. II. c. 13, s. 2, Irish.

would deprive a landlord of the benefit of an express condition of re-entry for non-payment of rent at common law, will defeat his ejectment founded on the Statutes. If, during the existence of the first lease, the lessor grant a concurrent lease of the same premises to another person, to commence *in præsentî*, reserving rent with the usual condition of re-entry, such concurrent lease takes effect as a grant of the reversion, and entitles the second lessee to the rent reserved by the first lease, and the lessor cannot, during the continuance of the first lease, re-enter, or maintain ejectment for non-payment of rent, as against the second lessee, having parted with the immediate reversionary interest expectant on such first lease. An ejectment for non-payment of rent reserved on a lease, operating as a grant of the reversion, is not to be maintainable during the continuance of a prior lease of the same premises outstanding in a third person, because of the existence of such prior lease, the lessor had no power to re-enter, but where a tenant in possession, who derived under the first lease, took defence, and it appeared that the first lessee was in possession, nor in receipt of rent, the Queen's Bench held that writs of re-entry were warranted in presuming, that the first lease had expired or surrendered to the second lessee, and judgment was given in favour of the defendant.

However, where a lease was made for three lives, operating as a grant of the reversion in part of the demised premises, which was subject to a prior freehold lease, and as a lease in possession of the reversion, it was contended that an ejectment for non-payment of the rent reserved by the second lease could not be maintained, because the first lease was then subsisting, and the lessor of the plaintiff had not a right of re-entry into the whole of the demised premises, but it was decided by the Exchequer, on a bill of exceptions, that the plaintiff was entitled to recover, though the persons deriving under the prior lease could not be affected by the eviction, and that at common law. In a similar case, there might have been a re-entry for breach of condition: it is to be observed, that in this case, the whole of the second demise was defeated, and there was no severance of the reserved rent.

The authority relied on in support of the preceding decision was

Westropp v. Moore, 2 Fox & W. 101; *Trustees of Jackson's Charity v. Jackson*, Hayes & J. 442; 2 B. & C. 28, 2nd series; *Lessee Dela-*

cour v. M'Carthy, Hayes & J. 474; 2 B. & C. 28, 2nd series; in the note; *Lessee Barrington v. Wolfe*, 5 Irish Law Rep. 426.

Rawlins's case(*g*), the facts of which are clearly and concisely stated by Sir Henry Pollexfen to have been(*h*), that one Warlow had a lease of a stable for six years, and Rawlins being possessed of a dwelling house, and being entitled to the reversion of the stable for a term of thirty years, demised the whole of the premises to Cartwright for twenty-one years, subject to a condition of re-entry for non-payment of rent: Cartwright afterwards re-demised the reversion of the stable to Rawlins for ten years, and the rent payable by Cartwright being in arrear, Rawlins entered for breach of the condition, and his entry was deemed lawful, because Warlow had not attorned to Rawlins, but if there had been an attornment, so as to vest the reversion in Rawlins, the condition would have been suspended. The effect of the attornment would have been to constitute Rawlins the immediate landlord of Warlow for the stable, and of Cartwright for the dwelling-house, by which means the condition would have been severed, but as the re-demise to Rawlins passed no immediate estate for want of attornment, the consequence was, that Rawlins continued the immediate landlord of Cartwright for the whole of the demised premises, and he was declared entitled to the benefit of the clause of re-entry. This view of Rawlins's case is corroborated by Brightman's case(*i*), which related to the same premises, though between different parties: in the latter case it appeared, upon a writ of error, that A leased two acres of land to B for twenty years, rendering rent, with condition of re-entry for non-payment; B demised one of the acres to C for ten years, and afterwards granted his reversion, subject to such underlease to A the original lessor, and it was ruled that such re-demise to A was no present suspension of the condition, because there was no possession: but if the lessor had accepted(*j*) a re-demise of parcel of the premises directly from the lessee, the condition would have been utterly defeated.

One Kemp having demised to Morris for twenty years, by lease containing a covenant to repair, with condition of re-entry for its non-performance: the lessee(*k*) underlet part of the demised premises to Hills for years, and the undertenant afterwards purchased from Kemp

(*g*) Rawlins's case, 4 Rep. 52; Rawlins v. Somerford, 4 Leon. 116, S. C.; Jenkins, 254, case 46; 1 Ro. Abr. 939, exting^d. H. plac. 9 and 10; and see Co. Litt. 218, A.

(*h*) Hodgkins v. Thornborough, Pollexfen, 144.

(*i*) Brightman's case, 3 Leon. 221; Brightman v. Somerford, cited 4 Rep.

52, B., S. C.; Britman v. Stanford, Owen, 41; the same point is reported in Gouldsb. 89, plac. 18, and 93, pl. 8, as in Rawlins's case.

(*j*) Britman v. Stanford, Owen, 41; Gouldsb. 89, plac. 18.

(*k*) Doe dem. Hills v. Morris, 6 Jurist. 326; 21 Law Journal, 313; Exch. Easter, 1842.

the reversion of all the lands comprised in the original lease : the part of the premises in possession of Morris being out of repair, Hills brought an ejectment under the clause of re-entry for recovery of the whole of the premises, and after verdict for the plaintiff, it was objected that the condition was entire, and did not admit of being severed by a partial eviction, but the Court held, that the ejectment being brought for eviction of all the lands, though the lessor of the plaintiff was in possession of parcel, he was, in point of law, entitled to recover the entire : that it was true the plaintiff could not avoid the lease as to part only, but he had established his title to the whole, and sought merely to recover the part of which he was not in possession.

56. It is a rule of the common law that a condition cannot be apportioned or divided by the act of a party, as if a lease be made of thirty acres, rendering rent with a clause(*l*) of re-entry, and the reversion in twenty acres be granted, the rent shall be apportioned by the act of the grantor, but the condition, which is entire and against common right, will be destroyed; however if the reversion be divided by act of law, the condition will be apportioned: if a person seised of lands in fee, and possessed of other lands for a term of ninety-nine years, demise the whole for a term of thirty-one years, at an entire rent, subject to a proviso of re-entry; upon the decease of the lessor intestate, the reversion will be severed by act of law, according to the nature of the estate, between the heir and executor of the deceased lessor, and the condition(*m*) will be apportioned in the same manner, and each party may re-enter for any breach of the condition by non-payment of rent for the portion to which he is entitled: but if such lessor assign his reversion in the demised premises to several persons, or demise such part of the reversion as was freehold to a person not being his heir, the condition(*n*) will be utterly defeated, the reversion being divided by the act of the party himself. Hence it follows, if a sole lessor assign his estate in the reversion to two persons as tenants in common, the reversion will be severed, and the condition defeated, and the

(*l*) Knight's case, 5 Rep. 55, B.; Twy-
nam v. Pickard, 2 B. & Ald. 105-112, by
Colroyd, J.; Co. Litt. 215, A.

(*m*) Winter's case, 3 Dyer, 308; Lee
Arnold, 4 Leon. 27; Appowel v.
Lonnoux, Moor, 97, S. C.; Perkins,
73, plac. 825; Bro. Abr. Conditions,
1. 193; and see Hill's case, 4 Leon. 187.

(*n*) Knight's case, 5 Rep. 54, B.;
Knight v. Beech, 3 Leon. 124; Moor,

199; Anderson, 173, pl. 211; Knight
dem. Fortescue v. Beech, Gouldsb. 15,
plac. 14; Gouldsb. 19, pl. 1, S. C.;
Moodie v. Garnon, 1 Ro. Rep. 330-367;
3 Bulst. 153; Moor, 848; Wood v. Ger-
mons, Cro. Jac. 390, S. C.; Dekins v.
Latham, Style, 316; Anon. Godb. 2, pl.
3; Culcoe v. Sharp, Noy. 126; Lessee
Denny v. O'Connell, Longf. & T. 629.

grantees cannot join in a demand for rent at common law, or enter **E** a condition broken by reason of its non-payment.

It appeared by special verdict that certain lands were demised **B** indenture for a term of thirty-one years, at a yearly rent of £14 8s. with the usual clause of re-entry in case of non-payment, and that several years afterwards, the tenant *verbally* agreed to permit and suffer the reversioner to take(*o*) possession of, and occupy a small portion of the demised premises, not exceeding an acre, for the purpose of planting, upon the terms of reducing the reserved rent to the sum of £8 17s. 8d. yearly: several years' rent, at the reduced rate, being in arrear, exceeding a full year's rent of the whole premises, it was ruled by the Queen's Bench, that an ejectment for non-payment of rent could not be sustained, because the dealing between the parties amounted to a re-demise, which suspended the condition of re-entry, as the condition is annexed(*p*) to the rent in quantity, and if the rent be diminished, the condition must fail: this case having come before the Exchequer Chamber on a writ of error, the majority of the judges were of opinion that, according to the facts found by the special verdict, the transaction between the parties did not constitute a re-demise(*q*), and was only a license to occupy the land for the purpose of planting and preserving trees: the case, however, ultimately terminated by a compromise, and no judgement was pronounced.

A tenant holding by lease at a lump-rent, being evicted from parcel of the demised premises by *title paramount*, a question was raised, whether the remedy(*r*) by ejectment for non-payment of rent was applicable under such circumstances: Lord Guillamore in pronouncing judgement said, that the ejectment could not be supported, as the tenant could not know how much money should be lodged in Court, nor could the landlord, after judgement by default, swear to any specific sum as being the year's rent, which shewed that the legislature never intended that the Ejectment Acts should apply to any such case. A similar difficulty would have occurred at common law, in making a demand of rent upon breach of a condition by its non-payment, for the party ought to demand the precise sum due, or not to re-enter, and though the condition might be divisible by act of law, yet, as Lord Coke

(*o*) Short *dem.* Delap *v.* Leonard, 5 Irish Law Rep. 287; 2 Jebb & S. 704; 1 Irish Circ. Rep. 66.

(*p*) Hodgkins *v.* Robson, 1 Vent. 276; 3 Keble, 557; Pollexf. 141; Mor-

timer *v.* Shortall, 2 Dru. & Warr. 374.

(*q*) Doe *dem.* Parsley *v.* Day, 2 Q. B. Rep. 147; 2 G. & Dav. 757.

(*r*) Lessee Swift *v.* Allanson, Batty, 326, note.

intimated(*s*), where the rent was incapable of being precisely ascertained, such right of re-entry would be unavailing.

Where the reversion of demised premises becomes divided between two or more persons by the act of the lessor, and the condition is thereby extinguished at common law, an ejectment for non-payment of rent cannot be maintained by both or by either of such assignees of the reversion; and even where the reversion, rent, and condition are apportioned *by act of law* between(*t*) two or more persons, the established doctrine, prohibiting a partial eviction of parcel of the land demised, for non-payment of rent, will deprive the parties entitled to the reversion, of the statutable remedy by ejectment, unless they happen to be interested as joint-tenants, or as coparceners.

57. Sir John Purcell being seised of certain lands in fee, and being possessed of a chattel interest(*u*) in other lands for a term of 999 years, by indenture dated the 22nd of August, 1801, demised both the freehold and the chattel to Samuel Kirby for a term of 900 years, at a gross rent of £793 17s. 4d. yearly, which was reserved out of the whole of the premises, subject to an express condition of re-entry in case the rent should not be paid at the stipulated periods. Sir John Purcell, on the marriage of his second son, conveyed his rent and reversion in the premises to trustees and their heirs, to his own use for his life, with remainder to the use of his second son John Purcell for his life, with remainder to other trustees, their executors, &c., for a term of 500 years, and subject thereto, to the use of the first, and every other son of the said John Purcell successively in tail male. In 1823, Sir John Purcell died, and in April, 1827, John Purcell, his second son, died, leaving William Purcell his eldest son, who died in April, 1833, whereupon, Charles Denroche Purcell, one of the lessors of the plaintiff, became entitled: upwards of one year's rent being in arrear, an ejectment for its non-payment was brought on the several demises of Charles Denroche Purcell, and of the trustees of the inheritance, as well as of the trustees of the term for 500 years, all the demises being laid on the 30th of May, 1834. A verdict was found for the plaintiff, ascertaining the sum which had accrued due for rent after Charles D. Purcell had become entitled, and also ascertaining the whole arrear of rent due out of the demised premises, subject, however, to the opinion

(*s*) Moodie v. Garnance, 3 Bulstr. Hodgens, Batty, 315.
155, by Ld. Coke, Ch. J.

(*t*) Lessee Stuart v. Smith, Batty, (u) Jack dem. Purcell v. Kirby, MSS.
116-318, note; Lessee Warrington v. K. B. Mich. 1835.

of the Court, whether the ejectment was maintainable, inasmuch as Sir John Purcell, by the settlement on his son's marriage, had apportioned the reversion, and by such means defeated the condition of re-entry, the reversion in the freehold, on the death of John Purcell the younger, by the effect of the Statute of Uses, having vested in the trustees of the term for 500 years, while the reversion in the chattel, not being affected by the Statute, continued vested in the trustees of the inheritance; and secondly, if the ejectment were maintainable, whether the finding of the jury should stand for the greater or for the smaller sum. In support of the verdict, it was contended(*v*), first, that the remedy given by the Ejectment Acts was not to be taken as analogous(*w*) to or as being founded on the right of entry at common law for a condition broken, but as a new remedy; secondly, that the reversion was severed by *act of law*, and not by the act of the party(*x*), because Sir John Purcell granted the entire reversion, as well in the freehold, as in the chattel, to the trustees of the inheritance, and that the apportionment was produced(*y*) by the operation of the Statute of Uses on the freehold estate, by which the legal estate was transferred to the use; thirdly, although the Court should hold that the condition was apportioned by the act of the party, yet, as several demises had been laid in the names of the trustees in whom the freehold was vested, and also in the names of the trustees in whom the reversion of the chattel was vested, that both such demises might be resorted to for the purpose of sustaining the verdict; and lastly, that as the persons entitled under the settlement had been in receipt of the reserved rent for upwards(*z*) of three years, it should be presumed, that the trustees of the inheritance had assigned the reversion in the chattel to the trustees of the term for 500 years, so as to enable the latter class(*a*) of trustees to maintain the ejectment for the whole arrear. On the other side(*b*) it was argued, that the Ejectment Acts formed only one code of law, and that the provisions of the Statute(*c*) 11 Anne, c. 2, continued applicable to ejectments brought for non-payment(*d*) of a whole year's rent: the whole system was founded on the existence of a clause of re-entry, either expressed or implied, and though the necessity of any express(*e*)

(*v*) By Jackson, Serjeant, and Collins.

(*w*) Lessee Keily *v.* Ahearne, Batty, 18, note.

(*x*) Co. Litt. 215, B.

(*y*) Stockman *v.* Hampton, Cro. Car. 441.

(*z*) 8 Geo. I. c. 2, s. 1, Irish.

(*a*) Lessee Friend *v.* Scott, Batty,

179, note.

(*b*) By Woulfe, Serjt. and Furlong.

(*c*) 11 Anne, c. 2, s. 2, Irish; 4 Geo. II. c. 28, English.

(*d*) Biddulph *v.* St. John, 2 Sch. & Lef. 530.

(*e*) 5 Geo. II. c. 4, Irish; 25 Geo. II. c. 19, Irish.

condition had been dispensed with, yet the landlord was only enabled to proceed in the same manner as if a clause of re-entry had been contained in the instrument, and *not otherwise*; it had, therefore, been decided, that any act of the landlord suspending(*f*) or defeating his immediate right of entry, suspends or destroys his statutable remedy by ejectment: that the reversion under the lease in the present case could not be deemed apportioned *by act of law*, appeared distinctly by the authority of Manwood, Justice(*g*), who is reported to have laid down, that an assignee of the reversion by bargain and sale enrolled, was *in* by the conveyance, and not by act of law: and even though the severance of the reversion should not be construed to prejudice the condition, it did not follow, that after such an apportionment, an ejectment could be maintained, because the landlord could not swear to any(*h*) specific sum being due for rent of either parcel, nor could the tenant know how much money to bring into Court on a judgement by default, and the consequence of such an apportionment would be, that either of the parties between whom the condition was divided, might enter for its breach, so far as it extended to their respective estates in the reversion, and by such means effect a partial eviction: that the owners of the reversion in the freehold, and of the reversion in the chattel real have separate estates, and do not hold even as tenants in common, and it is obvious, from the frame of the Ejectment Acts, that the entire rent must be due(*i*) to a person entitled to the whole reversion, and must not be apportioned amongst persons having separate estates in the reversion: after a second argument(*j*), by desire of the Court, the question reserved was ruled in favour of the defendant, and judgement of non-suit was ordered to be entered.

58. Upon the trial of an ejectment for non-payment of rent, it appeared that the tenant(*k*) held under a lease for lives at the yearly rent of £60, subject to a condition of re-entry, and that the landlord accepted a parol demise from his tenant of part of the lands at a yearly rent of £10, which was always allowed out of the rent reserved by the original lease: it was contended, that the landlord having accepted a lease of part of the demised premises, was precluded from entering at common law, for breach of the condition, and that his remedy under

(*f*) Lessee Westropp v. Moore, 2 Fox & S. 363.

(*g*) Lee v. Arnold, 4 Leon. 27; and see Dekins v. Latham, Style, 316.

(*h*) Lessee Swift v. Allanson, Batty, 326; Moodie v. Garnance, 3 Bulst. 153.

(*i*) Huds. Comm. 467.

(*j*) By Collins, for the lessors of the plaintiff, and by Furlong, for the defendant.

(*k*) Lessee Keily v. Ahearne, Batty, 19; but see Short dem. Delap v. Leonard, 5 Irish Law Rep. 287, ante.

the Ejectment Acts was gone, as part of the rent reserved was charged by the rent receivable from the landlord ; but the Exchequer held, that supposing the right to enter for the condition broken, common law, was defeated, yet as the relation of landlord and tenant continued to subsist between the parties, and a full year's rent was due under the original lease (after deducting the rent payable by the landlord), that the lessor of the plaintiff was entitled to recover : in the preceding case, the amount of rent payable by the tenant was clearly ascertained, but the decision can hardly be supported, unless it should be considered that the legislature by the Ejectment Statutes introduced a new remedy for the benefit of landlords, quite independent of the condition of re-entry.

59. If a reversioner enter upon and evict the tenant from any part of the subject of the demise, the rent and condition will be suspended: the house and lands of Griston (except the bog) were demised to Frederick Massy for lives renewable for ever, at a yearly acreable rent, *with liberty of the commonage of the bog, in as large and ample a manner as theretofore enjoyed by the lessee*. Upon motion to set aside a verdict obtained by the lessors of the plaintiff for non-payment of rent, it was ruled⁽¹⁾, that the soil of the bog did not pass by the terms of the demise, and that evidence was not admissible to shew that, prior to the grant of the lease, the bog had been enjoyed by the lessee as if he had the interest in the soil, and by such means to prove what the parties intended should pass under the demise, for though evidence of that nature might be received to explain some ambiguity in a deed, yet such evidence was not admissible to contradict the terms of the lease : and the Queen's Bench held, that although the lessee's interest in the bog was only an incorporeal hereditament, and although the rent issued out of the land alone, yet the right of commonage passing under the lease and being a matter capable of fruitful occupation, the reserved rent might have been calculated according to the tenant's beneficial interest in the bog, and if the tenant were deprived of that interest, the effect might be to suspend the entire rent, or at least to cause it to be apportioned ; while, upon the other hand, the interference of the landlord with his tenant's interest in the bog might possibly be nothing more than a mere trespass, which could not amount to an eviction, so as to suspend or to apportion the rent, and as the facts stated did not enable the Court to arrive at any satisfactory conclusion on the subject, a new trial was granted.

(1) Lessee Gubbins v. Massy, 3 Irish Law Rep. 239 ; Q. B. Hil. 1841.

60. A condition of re-entry will also be extinguished, not only by its severance, but by any alteration in its extent or quality: a person leased in fee, by indenture, demised lands for twenty-one years, subject to a yearly rent of three pounds, and after the death of one J. S. of the payment(*m*) of a gross sum by way of fine, payable by five pounds yearly, with a proviso that for default of payment of the rent or fine, or for want of reparations, it should be lawful for the lessor to re-enter: the lessor having assigned over his interest in the reversion, the question was whether the condition of re-entry was transferred to the assignee by the grant of the reversion. The rent, being incident to the reversion, passed to the assignee, but the fine, which was a sum collateral, or in gross, remained in the lessor after the assignment, and it was ruled that a lessor could not, by his own act, sever the condition, and that an ejectment grounded on the clause of re-entry could not be maintained; and it was said by Rolle, C. J., that if the lessor had released the part of the condition relating to reparations, the condition would be defeated as to the other matters, as the reversion was transferred by the lessor's own act, and the condition was entire and went in destruction of the estate. In the King's case, however, a condition may be apportioned by force(*n*) of the royal prerogative. A condition cannot be apportioned, in the case of an ordinary person, either by act of the party or by title(*o*): lands being demised for years rendering rent, with a proviso of re-entry, a judgement was recovered against the lessor, upon which a moiety of the rent and reversion was extended, and it was ruled(*p*) that the condition was suspended during the extent.

(*m*) Dekins v. Latham, Style, 316.

(*n*) Knight's case, 5 Rep. 54, B.; Co. Litt. 215, A.

(*o*) Knight's case, Gouldsb. 21, pl. 1.

(*p*) Anon. 4 Leon. 201, case 322; Anon. Moor. 22, pl. 75.

CHAPTER XI.

NON-PAYMENT OF RENT.

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| <p>61. <i>Statutable Remedy confined to sole Lessor, or to several Lessors jointly interested.</i></p> <p>62. <i>Heir cannot recover in Ejectment, for Rent due in his Ancestor's Life-time.</i></p> <p>63. <i>Right of Entry by Parceners, and by Joint-Tenants.</i></p> <p>64. <i>— by Executors, for Rent due in Lessor's Life-time, as well as after his Decease.</i></p> <p>65. <i>Lessee, by his own Act, cannot qualify Lessor's Right of Re-entry.</i></p> <p>66. <i>What Instrument will sustain Ejectment for Non-payment of Rent.</i></p> <p>67. <i>Must be executed by Lessor.</i></p> <p>68. <i>Whether Ejectment lies against yearly Tenant, holding under written Instrument.</i></p> <p>69. <i>Or against Lessee for Lives renew-</i></p> | <p><i>able for ever, after all the Lives have fallen.</i></p> <p>70. <i>Evidence to be given of the Tenant's Holding.</i></p> <p>71. <i>When Tenant compelled to produce his Lease.</i></p> <p>72. <i>Receipt of Rent by Landlord for three Years.</i></p> <p>73. <i>Ejectment by Lessee for Lives renewable for ever, after all the Lives in his Lease have fallen.</i></p> <p>74. <i>Rent need not be demanded, though required by Clause of Re-entry.</i></p> <p>75. <i>A full Year's Rent must be in Arrear.</i></p> <p>76. <i>Demise in Ejectment should be laid after Right to enter has accrued.</i></p> <p>77. <i>Whether Ejectment Acts applicable to Recovery of penal Rents.</i></p> |
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61. SERVICE of an ejectment being substituted for demand of the rent at common law, it follows that the ejectment cannot be sustained, unless grounded upon a demise in the name of a person, or of persons who would have been competent, at common law, to make a demand of the rent. It is, therefore, to be inferred that the rent in arrear sought to be recovered must be due and payable either to a single lessor of the plaintiff, or to several lessors of the plaintiff who are jointly interested in the premises as parceners or as joint-tenants. If tenants in common join in making a lease rendering rent, the reservation, though made by joint words, enures^(a) according to the nature of the reversion, and the mere proof of the execution of a joint lease, will not raise^(b) a presumption, as against a stranger, of a joint title in the lessors to demise. A joint demise, therefore, in an ejectment for non-payment of rent, cannot be supported by a joint lease made by tenants in common, if the nature of the reversion be disclosed in evi-

(a) *Doe dem. Poole v. Errington*, 3 Nev. & M. 646, and the note; 1 Ad. & Ell. 750; *Burne v. Cambridge*, 1 Moo. & Rob. 539; *Doe dem. Barney v. Adams*, 2 Tyrw. 289; 2 Cr. & Jerv. 232; Tre-

port's case, 6 Rep. 14, B.; Bull. N. P. 107.

(b) *Doe dem. Poole v. Errington*, 3 Nev. & M. 652, note.

ce, unless the defendant is estopped(c) by his deed from disputing it the lessors are jointly entitled: a covenant entered into by a lessee with two lessors, to pay them jointly the reserved rent(d), warrants joint action by both lessors for its breach, although they are proved to be tenants in common. Under a separate lease made by tenant in common of his undivided share, the lessee's interest may be evicted for non-payment of the reserved rent.

62. An heir by descent entitled to a freehold reversion may enter a condition broken for non-payment of rent falling due in his own life, but he cannot(e) enter for breach of such a condition occurring at the time of his predecessor, because the rent due to the ancestor at the time of his decease, becomes the property of his personal representatives, and was(f) not demandable by the heir, nor can the heir take advantage(g) of a demand of rent made by his ancestor.

63. Where a tenant owed two years' rent to two parceners, and afterwards one of them died(h) leaving issue, it was held that the survivor could not recover the arrear upon a "*cessavit*," though both might have joined during their lives for its recovery: and it was also held that the aunt and niece(i) could not join for a *cesser* of the rent occurring in the life-time of the niece's mother, though they might sue for the rent subsequently becoming due; but where a lessee owed two years' rent to joint-tenants, it was considered that the survivor(j) had a right to recover for the *cesser* in his companion's life-time, for in that case, the whole estate is in the survivor by the first feoffor, and not by him who died: it seems, however, that a single co-parcener cannot(k) recover in ejectment for breach of a condition, as parceners(l) constitute but one heir, and the descent is entire to all of them.

64. If a person possessed for years, demise for a lesser term, reserving rent with proviso of re-entry, his executors may re-enter(m) for non-payment of rent becoming due after their testator's death, but it

(c) Doe *dem.* Barker v. Goldsmith, 2 Strw. 713; 2 Cro. & Jerv. 674.

(d) Wallace v. M'Laren, 1 Mann. & Ry. 516; Sorsbie v. Park, 12 Mees. & W. 146.

(e) Ayer v. Orme, 2 Dyer, 221, B.; M'Noloe & Dal. 129; Dalis. 53, pl. 31; Dyer, 51; 1 Anders. 9, S. C.

(f) Shepp. Touchst. by Preston, 153.

(g) Anon. 3 Leon. 104, pl. 152, in 2.

(h) Bro. Abr. Cessavit, pl. 29; Vin. Abr. Cessavit, C. pl. 243; Huds. Com. 1.

(i) Bonham's case, 8 Rep. 118, A.; 2 Co. Inst. 402; Fitzh. Abr. Cessavit, pl. 42.

(j) Bro. Abr. Cessavit, pl. 29.

(k) Doe *dem.* De Rutzen v. Lewis, 5 Ad. & Ell. 277; 6 Nev. & M. 764, S. C.; but see Doe *dem.* Gill v. Pearson, 6 East, 173; 2 Smith, 205.

(l) Stedman v. Bates, 1 Salk. 389; 1 Ld. Raym. 64; Reading v. Royston, 1 Salk. 242; 1 Comyns, 123; 2 Ld. Raym. 829; and see note D. to Dumpor's case, 4 Rep. 120, B.

(m) Co. Litt. 214, B.

was doubted whether the personal representatives of a lessor who died possessed of a chattel reversion expectant on a subsisting demise, could enter for breach of a condition incurred by non-payment of rent in the lessor's life-time, because such breach⁽ⁿ⁾ being only a forfeiture at the election of the lessor, it was contended that his executors were not competent to make the election after his decease. However, where a termor holding for twenty years demises for ten years, reserving rent, his executors may distrain at common law for the arrears which became due^(o) in the testator's life-time, because these arrears were never separated from the reversion, and both belong to the executors in the same plight as the testator had them.

It has been decided by the Queen's Bench that the personal representatives of a lessor who was possessed of a chattel reversion, might recover in ejectment for non-payment of rent, which became due in the life-time of the deceased landlord, provided the lessor of the plaintiff combine in himself both the ownership of the rent in arrear, and of the reversion under the same title. Upon the trial of an ejectment for non-payment of rent, brought on the demise of Frances Ormsby, as administratrix of John Ormsby, it appeared that John Ormsby being possessed^(p) for a long term of years, by indenture dated the 18th of April, 1809, demised to Richard Smyth for a lesser term, at a rent of £109 2s., payable in March and September; in August, 1835, John Ormsby, the lessor, died intestate: the jury found a verdict for the lessor of the plaintiff, and ascertained that one year's rent of the premises was due prior to the death of the lessor, and that half a year's rent subsequently became due to his administratrix: a question being reserved on the right of the lessor of the plaintiff to maintain the ejectment, judgement was given in the plaintiff's favour, for the full amount of the rent ascertained by the verdict, because the administratrix was owner as well of the reversion as of the rent, and being entitled to both in the same character, there was no ground for alleging that the arrear which became due in the life-time of the intestate was ever separated from the reversion. The principle involved in the preceding decision was carried much farther by the Common Pleas in a subsequent case: where it appeared that the lessor died seised of a freehold reversion, subject to an outstanding lease, and that he by his will devised all his

(n) *Cornwallis v. Hammond*, Palmer, 417, by Dodderidge, J.; *Eastcourt v. Weeks*, 1 Salk. 187; 1 Lutw. 799, S.C.

(o) *Wade v. Marsh*, 1 Ro. Abr. 672, Distress, O. pl. 13; *Latch*. 211; *Duppa*

v. Mayo, 1 Saund. 282, note C.; *Perkins*, plac. 833.

(p) *Jack dem. Ormsby v. Smith*, 4 Law Rec. 19, 2nd series, MSS., K. B.

estate(*q*) to one Crooke, his heirs and assigns, and appointed the same person his executor, who duly obtained probate : a year's rent was due by the lessee to the testator at the time of his death, and another half year's rent having incurred due to the devisee, an ejectment for non-payment of rent was brought by such devisee and executor, in which he obtained a verdict, subject to a question reserved, whether the lessor of the plaintiff, being entitled to the reversion of the demised premises, and to half a year's rent in the capacity of devisee, and also to a whole year's rent in the character of executor, had a right to recover, and it was decided by a majority of the Court that the lessor of the plaintiff was to be considered(*r*) under the Statute, 5 Geo. II. c. 4, "as a person claiming or deriving under the lessor," and the verdict in his favour was established.

65. The lessee cannot by any appointment(*s*) of the demised premises, or by any limitation of his interest in the lease, qualify, or defeat his landlord's right of entry for a condition broken : if a tenant limit his estate in demised premises to his own use for life, with remainder over in strict settlement, the landlord, by demanding the rent from(*t*) the tenant for life, may re-enter for breach of any condition in the lease, and defeat the ulterior limitations.

66. By the Ejectment Acts, a landlord is enabled to recover possession, when a year's rent is in arrear of any lands holden under a lease, minute, or contract in writing containing an *actual demise*(*u*), or where the rent is ascertained by such article, minute, or contract in writing, though it does not contain(*v*) any actual demise. For the purpose of recovering in ejectment for non-payment of rent, it is requisite that there shall be, (1), an article, minute, or contract in writing, between the landlord and tenant, concerning the lands, tenements, or hereditaments for which the rent is claimed ; and (2), that the rent payable for the premises shall be ascertained by such instrument ; and (3), that the premises shall have been enjoyed under it ; and (4), that one whole year's arrear, or more, of the rent so ascertained, shall be due from the tenant under such contract to the landlord : George Thompson, by indenture dated the 30th of June, 1827, demised cer-

(*q*) Lessee Crooke v. Callaghan, 6 Law Rec. 317-359, C. B., Trin. 1838, Johnson, J. *dissentiente* ; but see Duckworth *dem.* Tubley v. Tunstall, Barnes, 184.

(*r*) 5 Geo. II. c. 4, s. 1, Irish.

(*s*) Hawkswith v. Davies, Godb. 382 ; Fitzwilliam's case, Palm. 382 ; 2 Ro.

Rep. 332.

(*t*) O'Connors v. Ld. Bandon, 2 Sch. & Lef. 679 ; Baker v. Morgans, 2 Dow's Parl. Ca. 532 ; Warren v. Lee, 2 Dyer, 126, B. pl. 54 ; Year Book, 29 Assis. fo. 159, pl. 17.

(*u*) 5 Geo. II. c. 4, s. 1, Irish.

(*v*) 25 Geo. II. c. 13, s. 2, Irish.

tain premises to George Home for thirty years, at the yearly rent of £500, and by another deed dated the 27th of July, 1829, after reciting the preceding lease, George Home, the lessee, in consideration of the sum of £525, surrendered to his lessor a specified portion of the demised premises, and by such deed(*w*) it was expressly agreed between the parties, that nothing therein contained should prejudice the covenant for payment of the yearly rent of £500, or any clause, covenant, or condition in the lease, or any remedy for recovery of the rent thereby reserved, and that the entire of such yearly rent should continue payable and issuing out of the premises not thereby surrendered: on the trial of an ejectment for non-payment of rent, the ascertainment of the rent, the enjoyment of the premises, and the amount in arrear were undisputed, but it was insisted, that the surrender of part of the demised premises had the effect of suspending the right of re-entry, by reason of the severance of the condition. The Queen's Bench, however, decided that the deed of July, 1829, not only contained a surrender of part of the premises, but substantially comprised an agreement, that the defendant, George Home, should hold the unsurrendered portion subject to the original rent of £500, and, though executed by the lessee alone, was such an agreement in writing as entitled the lessor of the plaintiff to judgement in the ejectment.

A deed was executed by several tenants, who thereby attorned to G. M. W. as landlord(*x*), and agreed to pay him their respective rents, and to perform all such covenants and agreements, as they were bound to perform as tenants, according to the several leases and agreements for their holdings, and on the determination thereof, to yield up the premises to G. M. W., his heirs and assigns: this instrument was not executed by G. M. W., and did not contain any demise, or agreement for a demise, nor disclose the nature or particulars of the holdings, further than by stating the rents payable by the tenants, and it was ruled, that such an instrument was merely an attornment, and did not warrant an ejectment for non-payment of rent.

67. The instrument ascertaining the rent on which the ejectment is founded, must, it is apprehended, be signed by the landlord, as the execution of a lease, or executory contract for a lease, by the lessee alone, and his acceptance of possession under it, can only confer an(*y*)

(*w*) Jack *dem.* Thompson *v.* Home, 1 Jebb & S. 440; 1 Irish Law Rep. 179.

(*x*) Jack *dem.* Warner *v.* Martin, 2 Jebb & S. 424; 3 Irish Law Rep. 79, S. C.

(*y*) Cardwell *v.* Lucas, 2 Mecs. & W.

111; Wilson *v.* Woolfryes, 6 M. & Selw. 341; Rose *v.* Poulton, 2 B. & Adol. 831; Frontin *v.* Small, 2 Ld. Raym. 1418; Doe *dem.* Marlow *v.* Wiggins, 7 Jurist, 529; *ante*, page 383.

on the tenant by the parol demise of the landlord, im-
 assent to the holding, and the tenant cannot be estopped
 ure for want of mutuality : and even if an ejectment for
 of rent would lie at the suit of the immediate lessor, it
 assignee(*z*) of the lessor's estate could not have a similar
 ere is no reversion expectant on the demise capable of
 rred. The Ejectment Acts(*a*) require that a whole year's
 due to the landlord by the person to whom such written
 l be made, which shews it was meant that the contract
 he lessor, and, by the Statute of Frauds(*b*), no interest in
 granted unless it be by deed(*c*), or note in writing signed
 ng party.

ctment against the assignee of a lease, founded on the
 re-entry for non-payment of rent, proof of the execution
 rpart(*d*) of the lease, without proving the original, or
 to produce it, was held sufficient evidence of the holding,
 e clause of re-entry, as it is not competent to a party, who
 under a deed all the interest which that deed was calcu-
 , to dispute its execution.

s not been decided, whether an ejectment for non-pay-
 (*f*) can be maintained against a tenant from year to year :
 ing is created by lease, or by agreement in writing for
 l so from year to year, at a specified rent, a term subsists
 e parties abstain from putting an end(*g*) to the tenancy by
 t, and during the existence of such term, it is submitted
 nt lies for non-payment of rent ; but where a holding
 he continuance of the tenancy after the expiration of a
 s, such holding does not depend immediately upon the
 nd the proceeding by ejectment cannot be sustained.

late Master of the Rolls(*h*), in speaking of leases for lives
 it of renewal for ever, observes, that if all the lives have
 landlord ceases to have the right of enforcing payment
 r of defeating the lease under the Ejectment Acts, and

. Goodman, 2 Q. B. Rep.
 av. 159.

II. c. 13, s. 2, Irish.
 159.

Aveline v. Whisson, 4
 01, as to deeds.

. West v. Davis, 7 East,

v. Lynch, 5 B. & Cress.
 J.

(*f*) Jack *dem.* Warner v. Martin, 2
 Jebb & S. 424 ; 3 Irish Law Rep. 79,
 S. C.

(*g*) The King v. Inhabitants of Herst-
 monceaux, 7 B. & Cr. 556 ; 1 Mann. &
 Ry. 426 ; Buckworth v. Simpson, 5
 Tyrw. 344 ; 1 Cro. M. & Rosc. 834,
 S. C.

(*h*) Shenton v. Corbally, 1 Hogan's
 Rep. 403-430, by Sir Wm. Mac Mahon.

that the tenant, by continuing the possession without a renewal, and by withholding the rent, violates his contract, and at the same time deprives his landlord of his remedy under the Ejectment Statutes, leaving him to recover by ejectment on the title, and exposing him to account for the mesne profits, without being able to demise the premises. A lessee having continued in possession under a lease for years with a *toties quoties* covenant of renewal, after his term had expired and without requiring any renewal, though the lessor had obtained a renewal of the original lease, the Exchequer decided⁽ⁱ⁾ that an ejectment would not lie for non-payment of rent, because the covenant binding the lessor to renew did not come within the meaning of the words "article, minute, or contract in writing," which are used in the Statute, such expressions being only applicable to instruments which, from their very commencement, were equitable agreements for leases.

There is no doubt that an equitable agreement for a lease for three lives *to be named*, with covenant of renewal for ever, at an ascertained rent, will support an ejectment for its non-payment, and no distinction is made in respect of the remedy by ejectment, where the lessee enters originally under an actual demise, and continues to hold under an equitable contract created by the same instrument, and where the tenant's original entry is to be referred to a contract which never conferred any legal estate; it is, however, to be considered, that a covenant for renewal is not a contract for payment of rent, and that the lessor in a lease for lives renewable for ever, only stipulates to grant a renewal on the previous payment of a renewal fine, and the performance of other acts on the tenant's part, though it may be argued that the continuance of possession by the lessee at the same rent, after all the lives have fallen, amounts^(j) to an affirmance, or acceptance of the contract for renewal, and that such an executory covenant is a contract in writing for a future lease by which the rent is ascertained.

70. It was formerly the usual practice for the lessor alone to execute the *original* part of the lease, and the counterpart was executed by the lessee alone, when the instruments were exchanged between the parties: by the Statute^(k), 8 Geo. I. c. 2, it was expressly required that due proof should be made on the trial, of the perfection of the *counterpart* of the lease, by which *the rent* sought to be recovered was reserved, and that the lessor, or those under whom he derived his title, had been in possession for three years before service of the ejectment,

(i) Napier's Dig. 149.

(j) Co. Litt. 231, A.; Jack *dem.* Thompson v. Home, 1 Jebb & S. 424;

1 Irish Law Rep. 179, S. C.

(k) 8 Geo. I. c. 2, s. 1, Irish.

new other sufficient title: but by the 5 Geo. II. c. 4, s. 3(*l*), that where one year's rent or more is due, if it shall appear to the Court that no counterpart was perfected, or if perfected, the counterpart is lost, or cannot be found, then that the lessor shall shew evidence the original part of the lease, minute, or contract, whereof, or a copy of such counterpart, and that the lessee has demised premises under such lease, minute, or contract: and if the lessor is unable to prove the execution of a part of the lease by the lessee, on which the ejectment is founded, and evidence is offered by proof of a lease, or instrument executed or alone, or by proof of a copy, it must be shewn that the tenant has demised the premises under such instrument.

If the part only of a lease has been executed, or if a lease(*m*), the counterpart can be found, is in the hands of the lessee, or in the hands of the tenant, the tenant is considered as a trustee of the instrument, and his landlord as for himself, and a court of law will make an order that the tenant shall permit his landlord to inspect and take a copy of the instrument at his own expense, for any purpose he shall require in an action between the parties: where two parts of an indenture have been executed, and one of them has been lost(*n*), the courts of law have refused to compel the production of the remaining part, for the sake of the party who had been so imprudent or unfortunate as to lose his part of the instrument, but the rule(*o*) has been altered by the Statute, in order to prevent the necessity of resorting to a Court of Equity for relief. It was laid down by Sir Anthony Hart, that if a landlord has lost(*p*) the counterpart of his tenant's lease, and applies to the Court for a copy, offering to pay the expense, which is refused, a decree in equity will compel him to give the copy, and also make him pay the costs of the suit to obtain it.

By the Statute(*q*), 8 Geo. I. c. 2, proof that the landlord, or the person from whom he derives, have been in possession for *three* years previous to the ejectment, is made sufficient evidence of title to the land prior to this enactment, after proving the counterpart of the lease under which the rent sought to be recovered was reserved, in case

II. c. 4, s. 3, Irish.
Slight, 1 Dowl. Pr. Ca.
v. Porter, 1 Taunt. 386;
4 Taunt. 666; Morrow v.
Brod. & B. 318; Lessee
v. Greene, Crawf. & D. 266;
son, Batty, 73; Blogg v.
5. 614; 4 Moo. & P. 453,

(*n*) Woodcock v. Worthington, 2 Yo.
& Jerv. 4; Alexander v. Alexander,
Alc. & Nap. 109.

(*o*) Doe v. Slight, 1 Dowl. Pr. Ca.
163.

(*p*) Perry v. Newenham, 1 Moll. 72;
Scott v. Miller, 6 Irish Eq. Rep. 120.

(*q*) 8 Geo. I. c. 2, s. 1, Irish.

defence had been taken in the name of a stranger to the demise, it was necessary to deduce title to the rent and reversion from the lessor to the person on whose behalf the ejectment was brought, and in order to obviate the necessity of proving the intermediate assignments, receipt of rent by the lessor of the plaintiff, or those from whom he derived for three years under the lease, preceding the latest payment of rent made prior to the service of the ejectment, was constituted evidence of the existence of the relation of landlord and tenant between the parties so as to enable the lessor of the plaintiff to sustain the ejectment. The lessor of the plaintiff having proved the lease, and payment of rent to himself for three years next preceding, and having also given in evidence a conveyance(*r*) which shewed that the legal estate in the rent, and reversion of the premises, was outstanding in trustees for a long term of years, to secure payment of a jointure, and the portions of younger children: after verdict for the plaintiff, upon a point saved for entering a nonsuit, in consequence(*s*) of the legal estate outstanding in the trustees of the term, the Court held that the plaintiff was entitled to recover. Evidence of payment of rent for three years can only prevail, where, after due proof made of the perfection of the lease, it is also established that the rent was received from a party(*t*) in possession of the premises, because payment of rent by a person out of possession cannot be admitted as evidence of possession, or title in the person to whom the rent was paid. It has been contended that proof of the lease and of receipt of rent under it for three years, afforded conclusive evidence of the landlord's right to recover; the Statute, however, does not declare that such evidence shall be conclusive(*u*), nor prevent it from being explained, or rebutted.

73. If a person seised of lands for lives renewable for ever, demise for different lives(*v*) or for years, and all the *cestuique vies* named in the chief lease die, without any renewal having been procured, though the legal estate in the original lease has determined, still the lessor may maintain an ejectment for non-payment of rent, whilst the under-lease is unexpired.

74. By the common law a landlord did not acquire any legal estate in the demised premises by re-entry, unless the rent in arrear had been

(*r*) Lessee Friend *v.* Scott, Batty, 179, note; Lessee Assignees of Pepper and Locke *v.* Newenham, 4 Law Rec. 155.

(*s*) See Cooper *v.* Blandy, 1 Bing. New C. 45; 4 Moo. & S. 562, S. C.

(*t*) Lessee Servante *v.* Hartley, Batty,

179, note.

(*u*) Lessee Servante *v.* Hartley, Batty, 179, note; Lessee Bonham *v.* Doyle, Batty, 171; Lessee Black *v.* Davis, Batty, 80.

(*v*) See Sparks *v.* Sparks, Hetley, 73; Cro. Eliz. 676; Moor, 569.

demanded, and the Ejectment Acts(*w*) having substituted an ejectment in lieu of such demand, the parties, by means of *a*, are placed in the same situation(*x*) as if a formal demand had been made of the rent at the time and in the manner which the law required: where the landlord, by the express stipulation in the lease, is only authorized to re-enter, on the rent in arrear *being demanded*, it has been decided(*y*), that the landlord ought to avail himself of the introduction of these words in the proviso of re-entry, to the benefit intended to be conferred on him by the Ejectment Acts, and that the ejectment was maintainable without any previous demand.

The rent in arrear sought to be recovered must be equivalent to, and must not exceed one whole year's rent, payable by the lease or otherwise, for which the premises are holden, and if the tenant has been compelled, or permitted by his landlord to pay, or has been under the threat of distress to discharge head-rent, quit-rent, or other rent, to which the landlord is subject in respect of the demised premises, and if such payment has been actually and *bonâ fide* made, the service of the ejectment, so as to reduce the rent in arrear to less than a whole year's reserved rent, the ejectment cannot be maintained.

The Ejectment Acts(*a*) require that a whole year's rent shall be due and unpaid, before service of the summons in ejectment, the proviso being only a modification of the ejectment at common law, founded on the clause of re-entry, in which the fictitious demise is laid on a day subsequent to the formal demand of the rent. The usual course(*b*) must be observed in the statutory ejectment, that the demise on some day after the year's rent sought to be recovered has become payable. Where the right of re-entry is postponed to the lease for twenty-one days, or other limited time, after the rent becomes payable, a legal demand of the rent could not have been made to cause a forfeiture, until the expiration of the days of postponement, as only a single year's rent was demandable at common law. Service in ejectment must have been laid on some day after the year's rent had accrued. In proceeding for recovery of half a

11 Geo. II. c. 2, s. 2, Irish; 4 Geo. II. c. 28, English.

m. Lawrence v. Shawcross, 10 Mod. 752; 5 Dowl. & Ry. 711,

n. Scholefield v. Alexander, 10 Mod. 525; *Doe dem. Lord*

Shrewsbury v. Wilson, 5 B. & Ald. 363-384.

(*z*) See *Lessee Gubbins v. Massy*, 3 Irish Law Rep. 239.

(*a*) 5 Geo. II. c. 4, Irish; 25 Geo. II. c. 13, Irish.

(*b*) 2 How. Law Exch. 65.

year's rent under the English Ejectment Act(c), it is considered that the demise must be laid on some day after the days of grace have elapsed: by the Irish ejectment code, the necessity of a clause of re-entry is dispensed with, and it is contended, that a lease containing an express proviso of re-entry should not place a landlord in a worse position than if no such condition had been inserted. The Court of Exchequer decided(e), that a demise laid in an ejectment on the day when a year's rent had become due, and before the right to re-enter by the lease had accrued, was sufficient, but a contrary opinion has been expressed(f) by the Queen's Bench on this subject. It is probable, however, that a demise laid by mistake in an ejectment for non-payment of rent, prior to the day on which the right of re-entry accrued, would be amended by the judge at *Nisi Prius*, by(h) substituting the day on which the right of entry was complete.

77. The same requisites(i) which are necessary to entitle a landlord to re-enter, at common law, for breach of a condition by non-payment of rent, are necessary to entitle him to recover a *nomine pænæ*. This is not considered so much a remedy for recovery of rent, as a means to ensure its actual payment: if a lease contain a proviso, that if the rent shall be in arrear for the space of thirty days next after the days of payment, the lessee shall forfeit ten shillings for every pound it shall remain unpaid, then in order to entitle the lessor to recover the penalty by distress(j), or otherwise, such penal rent must be demanded in like manner, and with the same strictness in every case as is required in cases of re-entry for non-payment of the rent.

The Ejectment Acts are not applicable to the recovery of increased rent, provided by the lease as a penalty: by indenture under the 28th of April, 1729, Richard Ponsonby demised certain premises to Hugh Swayne, for lives renewable for ever, at the yearly

(c) 4 Geo. II. c. 28, Eng.; 11 Anne, c. 2, Irish.

(d) Doe *dem.* Lawrence *v.* Shawcross, 2 B. & Cress. 752; 5 D. & Ry. 711; Doe *dem.* Edwards *v.* Leach, 3 Mann. & Gr. 229; 3 Scott's N. R. 509.

(e) Lessee Keiley *v.* Ahearne, Batty, 19; Lessee Cassan *v.* Clarke, Trin. 1844, in the Exchequer.

(f) Lessee Murnane *v.* Power, cited 5 Irish Law Rep. 299, by Crampton, J.; Short *dem.* Delap *v.* Leonard, 5 Irish Law Rep. 287; and see Lessee Kingston *v.* Kelly, 5 Irish Law Rep. 313, C. B.; 2 How. Law Exch. 65.

(g) Doe *dem.* Edwards *v.* Mann. & Gr. 229; 3 Scott's N. R. 509.

(h) 3 & 4 Vict. c. 105, s. 48, & 4 Will. IV. c. 42, s. 23, English.

(i) Duppa *v.* Mayo, 1 Saund. note 16; Maund's case, 7 Rep. 2nd Resolution; Bac. Abr. Rent, Gilb. Rents, 140.

(j) Grobham *v.* Thornborough, 82; Howell *v.* Sambach, Hob. Ro. Abr. 459, Condition, Z. pl. 5; 12 Mod. 73, case 131, by Holt; Tracy *v.* Dutton, Palm. 206; C. B. 617.

l., and the lessee covenanted that he and his heirs, with
ly, should live on the demised premises(*k*) during the con-
ie lease, and of all future renewals, and whenever he or
ail to do so, that the reserved rent should rise to the sum
so continue yearly to the end of the lease, and of any
o be granted in pursuance of the covenant for renewal:
l his family ceased to reside on the lands after the year
r Henry Cavendish having purchased the tenant's inte-
ment was brought for non-payment of the increased rent,

verdict was found, raising the question, whether the
ectment given by the Statutes(*l*) for non-payment of rent
he rent claimed to be due, in consequence of the breach
for non-residence, and the Court of King's Bench held,
ct of the Ejectment Acts was confined to rent-service, or
h was originally reserved as an equivalent for the land
judgement was entered for the defendant.

f the ejectment is substituted only for the demand, which,
aw, was required to be made on the very day when the
became payable, and not for a subsequent and different
lered necessary at some other period, by the non-observance
the fulfilment of which was secured by a penalty. The
n an ejectment for non-payment of rent, having, before
d the arrears of rent, which were refused, as the lessor of
claimed a penal rent, incurred by underletting part of the
order was made, giving the defendants liberty to lodge the
l, with the costs, but if upon the trial it appeared that any
beyond the sum tendered, the plaintiff should be entitled
of the action, and it was observed(*m*), that if the lessors
iff succeeded in proving that the penal rent was due, they
verdict: this latter point does not appear to have been

to avoid the difficulties attending the recovery of a penal
ne pænæ, a large rent is sometimes reserved, with a pro-
try in case of its non-payment, accompanied by a stipula-
esser sum shall be accepted, if paid within a specified time:
vation often causes much embarrassment, and is seldom
h any advantage to the landlord.

dem. of Carrique Pon-
dish, K. B. Trin. 1775;
C. J., Chr. Robinson,
; see the case in the Ap-

(*l*) See *Hume v. Kent*, 1 Ball & B.
554, by Ld. Manners.

(*m*) *Jones dem. Young v. Bell*, 3 Irish
Law Rep. 217.

CHAPTER XII.

NON-PAYMENT OF RENT.

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| <p>78. <i>Tender of Rent and Costs by Tenant before Trial.</i></p> <p>79. <i>Tender of Rent and Costs by Mortgagee.</i></p> <p>80. <i>Ascertainment of Rent after Judgement by Default.</i></p> <p>81. <i>Effect of Judgement and Execution.</i></p> <p>82. <i>What Acts before Entry for a Forfeiture amount to Waiver.</i></p> | <p>83. <i>What Acts after Ejectment the Forfeiture.</i></p> <p>84. <i>Waiver by Acts of the after Execution executed</i></p> <p>85. <i>Mode of Dealing with Premises during redemption Period.</i></p> <p>86. <i>Effect of redemptionary after Execution executed</i></p> |
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78. By the Statute(a), 11 Anne, c. 2, it is provided, that tenant, or his assignee, shall at any time, before trial, pay, or tender to the lessor, or landlord, his executors or administrators, their agent(b), or attorney in the cause, all the rent and arrears together with the costs, all further proceedings in the ejectment discontinued. Antecedently to the preceding enactment, courts exercised a discretionary power in cases of ejectment founded on condition of re-entry for non-payment of rent, of staying proceedings at any time before execution executed(c), on bringing into Court the amount in arrear and costs, accepting a new lease, and sealing a court order since the Statute, relief can only be granted to the tenant at payment of the rent and costs, or on lodging the amount in Court before trial, and if judgement be obtained on consent, or by agreement the proceedings will be stayed on the same terms, provided application be made for that purpose before(e) execution executed: upon a taking made before trial to pay the rent and costs, proceedings(j) will be stayed, and the officer will be ordered to tax the costs in the same manner as if a writ of possession had been executed. Courts of law have no jurisdiction to stay proceedings in an ejectment on a claim

(a) 11 Anne, c. 2, s. 5, Irish; 4 Geo. II. c. 28, s. 4, English.

(b) The word "agent" is not in the English Act.

(c) *Downes v. Turner*, 2 Salk. 597; *Goodtitle v. Holdfast*, 2 Stra. 900; *Phillips v. Doelittle*, 8 Mod. 345; *Smith v. Parks*, 10 Mod. 383; *Duckworth v. Tunstall*, Barnes, 184.

(d) *Roe dem. West v. Davis*, 7 East,

364; *Lessee Bruen v. Maher* Exch. Rep. 493; *Doe dem. Moore v. Thrustout*, 1 Huds. & Jones dem. *Young v. Bell*, 3 Rep. 217.

(e) *Lessee Gabbett v. Moore Jones's* Exch. Rep. 28.

(f) *Lessee Moland v. Ejectment* & J. 665.

entry(*g*) for not repairing, as it would be most inconvenient to exercise such an authority in cases embracing disputes as to the condition of demised premises.

Tender of the rent in arrear prior to the service of an ejectment, or subsequent tender of the rent and costs by a tenant, does not afford any defence(*h*) on the trial of the cause, but should be made the subject of application to the Court, before trial, to stay the proceedings, when relief may be granted on bringing in the money: it was contended that tender of the rent in arrear and costs at any time within six months after execution executed, was equivalent(*i*) to payment, and re-vested in the tenant a right of entry, on which an ejectment might be maintained; but it was decided by the Irish House of Lords, that nothing short of actual payment to, and acceptance by the landlord of the rent and costs, or by depositing the amount in a Court of Equity on filing a bill within six months after execution executed, would be sufficient to keep the tenant's title in existence.

79. By the Statute(*j*), 8 Geo. I. c. 2, lessees and mortgagees, and their respective assignees, who shall be served with the ejectment, are barred, unless such mortgagee, or his assignee, within nine months after execution executed, shall pay, or tender to the landlord the rent and costs; but in default of registry of any mortgage of a lease, or any(*k*) assignment thereof, within six calendar months after its perfection, the landlord may proceed as if such mortgagee or assignee were duly served.

Upon payment of the arrear of rent and costs by a mortgagee of the lessee's interest(*l*) within nine months after execution executed, the Court, on an affidavit of the facts, will award a writ of restitution to put the mortgagee into possession: if a mortgagee tender the rent and costs within the prescribed limit of nine months, restitution will be awarded on lodging the amount in Court, within that time, for it cannot be supposed(*m*) that the mere tender of the money, though not accepted, should re-vest the tenant's interest, so as to enable the mortgagee to recover possession by ejectment at an indefinite period: the

(*g*) *Doe dem. Mayhew v. Asby*, 10 Ad. & Ell. 71; 2 P. & Dav. 302; *Pure dem. Withers v. Sturdy*, Bull. N. P. 97; *Doe dem. Lambert v. Roe*, 3 Dowl. Pr. Ca. 557.

(*h*) *Lessee Geoghegan v. Gardiner*, in the Appendix to *Hayes & J.* 17; and see *Doe dem. Lawrence v. Shawcross*, 3 B. & Cress. 756, by Holroyd, J.

(*i*) *Ld. Kenmare v. Magee*, Lessee of

Supple, Vern. & Scr. 1.

(*j*) 8 Geo. I. c. 2, s. 4, Irish.

(*k*) *Biddulph v. St. John*, 2 Sch. & Lef. 533.

(*l*) *Lessee Bernard v. Brownrigge*, Vern. & S. 258.

(*m*) *Ld. Kenmare in Error v. Supple*, Vern. & S. 13; *Ld. Lifford's reasoning* is applied to the tenant.

mortgagee usually requires an account of the rents and profits received by the landlord out of the demised premises, after executing his writ of possession, and is obliged, for that purpose, to resort to the interference of a Court of Equity: the mortgagee of a lease has the same title to relief, and upon the same terms as an evicted lessee; and, therefore, a mortgagee, who was not served with the ejectment, and was not aware of the proceedings, was ordered⁽ⁿ⁾ to be put into possession, after execution executed, although the landlord had demised the evicted premises to a tenant who had expended money in their improvement.

80. In case of judgement by default against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it must be made appear^(o) to the Court, where the suit is depending, by the affidavit of the landlord, or lessor, his agent or receiver, that a year's rent was due before service of the summons in ejectment, and then such landlord, or lessor, or his lessee in ejectment, shall recover judgement, and have execution thereon.

After judgement by default in an ejectment for non-payment of rent, a writ of possession was executed, before any affidavit was filed, ascertaining the rent in arrear, and although an affidavit for that purpose was subsequently filed, the King's Bench set aside the writ^(p) of *habere*, and awarded a writ of restitution to restore the tenants who had been dispossessed, because by the policy of the Statute, the tenant's possession ought not to be disturbed, until after the rent had been^(q) ascertained: but a writ of *habere*, sued out after a consent for judgement, will not be set aside, for want^(r) of an affidavit ascertaining the arrear of rent, because the consent for judgement is an admission that a year's rent was due at the time of bringing the ejectment, and the Statute does not require that the full amount of the rent in arrear shall be ascertained, though a salutary practice has prevailed of making such an affidavit. Where an affidavit to ascertain the rent in arrear was filed, leaving a blank space for the sum due, but stating that a year's rent of the premises was owing at the time of the service of the ejectment, and remained due at the time of swearing the affidavit, the Queen's Bench held^(s), that the irregularity in the affidavit would not prevent the bar created by the Statute from taking effect: and Burton, J., observed,

(n) Doe *dem.* Whitfield *v.* Roe, 3 Taunt. 402, under the English Act.

(o) 4 Geo. I. c. 5, s. 3, Irish.

(p) Pry *dem.* Townsend *v.* Ejector, Alc. & Nap. 228; Lessee Nugent *v.* Ejector, 1 Jones's Exch. Rep. 103.

(q) The rent may be ascertained by

affidavit, without any rule; Ld. Kenmare *v.* Supple, Wallis, 362; Vern. & S. l.

(r) Lessee O'Hara *v.* Dolphin, Hayes & J. 137.

(s) Jack *dem.* Lowry *v.* M'Roberts, 1 Jebb & S. 135.

osing the affidavit to be defective, and the execution of the regular, the party claiming should have applied to set aside(*t*) pending for irregularity, and not having done so, the Court treat the execution as a nullity, but must look upon it as as having the conclusive operation given by the Statute.

the relation of landlord and tenant subsist, a judgement in for non-payment of rent concludes(*u*) all questions incident ation, such as the amount of rent(*v*), and the landlord is not hew, upon a subsequent proceeding brought to disturb his , that his former ejectment was in all points sustainable. ement by default, in an ejectment for non-payment of rent, ejectment was brought by the evicted tenant, on an allega- here was no lease or article between the parties, as required tute, and it was ruled(*w*), that the evicted tenant was bound h by evidence, the invalidity of the former proceeding, or to the necessary relation did not exist between the parties: and ery in ejectment(*x*), where less than a year's rent appears to on a counter-ejectment, the evicted tenant is bound to prove sufficient distress on the premises at the time of bringing ejectment, to satisfy the rent then due. After judgement , in ejectment for non-payment of rent, and execution exe- ounter-ejectment was brought by the evicted tenant, on the there being no affidavit forthcoming to ascertain the rent in the inadequacy of the distress, and the right to re-enter as y the English Statute(*z*); but judgement was given for the or, as observed by Lord Mansfield, the affidavit might be : landlord might be unable to come at it, although, in fact, ne had been made to support the judgement and execution, ld be too hard to put the labouring oar upon the landlord of fter the lapse of nearly twenty years, the regularity of all istances upon which the judgement and execution were

a lease containing a clause of re-entry for non-payment of

1 *v. Pakeman*, 2 Cro. M. & Tyrw. 721; *Adams*, 172, in

: *Black v. Davis*, Batty,

iony *v. Dickson*, 2 Sch. & ack *dem. Lowry v. M'Ro-* & S. 144.

dem. Connor v. Disney, 2

Huds. & Br. 113.

(*x*) Under the Stat. 11 Anne, c. 2.

(*y*) *Doe dem. Hitchings v. Lewis*, 1 Burr. 614; 2 Ld. Kenyon, 320; *Blennerhassett v. Day*, 2 Ball & B. 124; Ld. Kenmare *v. Supple*, Vern. & S. 8; *Wallis*. 362; *Adams*, 172, in the note.

(*z*) 4 Geo. II. c. 28, English; 11 Anne, c. 2, Irish.

rent, and dispensing with the necessity of any demand, upwards of one year's rent being in arrear, judgement in ejectment(a) for its non-payment was obtained, and the writ of possession executed: a counter-ejectment was brought by the evicted tenant, because the prior ejectment had not been served on the necessary parties: upon the trial of the second ejectment it was proved, that at the time of bringing the former ejectment, there was not sufficient distress on the premises to satisfy the rent in arrear, and as a demand had been dispensed with, it was ruled, that the possession obtained under the *habere* might be referred to the breach of the condition, at common law, and afforded a good defence to the second ejectment. In order to enable a landlord to maintain his possession against a tenant evicted, at common law, under the usual clause(b) of re-entry for non-payment of rent, it must be proved that the common law formalities with respect to the demand were complied with, as no legal title is acquired until demand made, unless a right were conferred by the condition to re-enter without demand.

Upon proof made by a person evicted for non-payment of rent, that the relation of landlord and tenant did not subsist between the(c) parties at the time of the service of the ejectment, the party so evicted may recover back the possession, because a judgement in ejectment under the Statutes(d), by a person having no estate or interest in the lands, cannot be any more a bar, than a recovery suffered, or fine levied, by a person having no interest or estate at the time.

82. After entry made for a condition broken, at common law, the tenancy was defeated, and as no privity existed between the parties, a distress for rent(e) could not have been supported, but receipt of rent by the landlord, as rent due under the lease, or a distress for rent, with knowledge of the facts which might create a forfeiture, *before entry* constitutes a waiver(f), and prevents the lease from becoming void; though receipt of rent *after entry*(g) for breach of the condition, will not have the effect of restoring the lease. Upon the trial of an eject-

(a) Horan *dem.* Warrington *v.* Hodgins, Huds. Comm. 479; Batty, 311; Doe *dem.* Hanley *v.* Wood. 2 B. & Ald. 741.

(b) Doe *dem.* Hornby *v.* Glenn, 1 Ad. & Ell. 49; 3 Nev. & M. 837; Doe *dem.* Lawrence *v.* Shawcross, 3 B. & Cr. 756, by Holroyd, J.

(c) Brown *dem.* Bond *v.* Trustees of Sterne's Charities, Batty, 87; Lessee Black *v.* Davis, Batty, 80.

(d) Blennerhassett *v.* Day, 2 Ball & B. 134.

(e) Lessee Ld. Ashbrooke *v.* Dowling, Batty, 14.

(f) Doe *dem.* Griffith *v.* Pritchard, 5 B. & Ad. 780; 2 Nev. & M. 489.

(g) De Chilton *v.* Tresk, Year Book, 45 Edw. III. fo. 298; Bro. Abr. 64, Assize, plac. 373; Doe *dem.* Morecraft *v.* Meux, 1 Carr. & P. 346, by Ld. Tenterden.

ment for non-payment of rent, it appeared(*h*) that in August, 1823, the landlord distrained sufficient goods to cover the half-year's rent due in November, 1822, which were replevied, and the replevin suit was then depending: in October, 1823, the landlord levied twenty pounds by distress, and it was insisted, that the pendency of the replevin suit precluded the landlord from taking credit in his ejectment, for the rent claimed by his avowry up to November, 1822, and after deducting the sum of £20 subsequently levied, a whole year's rent was not in arrear at the time of the service of the ejectment, but the Court held, that the pendency of the replevin suit, or any distress(*i*) without a levy, was no satisfaction of the rent due, and afforded no defence to the ejectment. Where a lessor was authorized, at any time during the continuance of the lease, to enter and plant forest trees, on giving previous notice of his intention to do so, and upwards of a year's rent being in arrear, a notice dated the 24th of November was given of the landlord's intention to plant(*j*), and an ejectment for non-payment of rent being subsequently served, laying the demise on the 16th of November, it was insisted, that the service of the notice to plant amounted to a waiver of the forfeiture, as it was an acknowledgement of a subsisting tenancy after the day of the demise in ejectment, but it was decided, that notice of planting did not occasion any waiver of the forfeiture.

A judgement recovered in an action of debt, or covenant for rent, remaining unsatisfied, will not defeat a condition of re-entry for recovery of the same rent, as these different modes of proceeding to enforce payment(*k*) are wholly independent of each other, and such judgement is merely a security for the original demand, until made productive in satisfaction to the party, and cannot operate to change any other collateral remedy which the landlord is entitled to: a landlord having recovered judgement against his tenant for a quarter's rent, Pennefather, C. J., held, upon a civil bill appeal(*l*), that this unsatisfied judgement was no bar to a civil bill ejectment for non-payment of a year's rent, in which the quarter's rent was included.

83. In an ejectment for non-payment of rent, the demise was laid on the 1st of October, and service was effected on the 1st of Novem-

(*h*) Lessee Trant v. Fogarty, Batty, 15.

(*i*) Lingham v. Warren, 2 Brod. & B. 36; 4 Moo. 409; Hudd v. Ravenor, 2 Br. & B. 662; 5 Moore, 542; Lear v. Edmonds, 1 B. & Ald. 157.

(*j*) Lessee Dawson v. Coghlan, Hayes, 509.

(*k*) Drake v. Mitchell, 3 East, 251; Twopenny v. Young, 3 B. & Cress. 208; 5 D. & Ry. 252.

(*l*) Rush v. Purcell, 3 Cr. & Dix, 162.

ber following, and the defence relied on was, that in the same month of November, after service of the ejectment, the landlord had distrain and by sale of the distress levied part of the rent in arrear, leaving however, a whole year's rent due at the time of the demise laid in ejectment, and it was ruled(*m*), that the landlord having a right to distrain within six months(*n*) after the determination of the tenancy, the distress was lawful, and the ejectment maintainable. It is said to have been often determined(*o*), that after an ejectment brought for non-payment of rent, if any further arrear shall be due, the lessor of the plaintiff may distrain for this arrear at any time before taking possession under his *habere*, or that he may bring his action for it at any time after the service of his ejectment, and that both the one and the other have been done before execution executed, and held good, and the several Ejectment Acts were designed in aid of the common law and for the relief of landlords in re-entries, and such proceedings are agreeable(*p*) to the common law; so that if a year's rent were due at the time of bringing the ejectment, and continue due at the time of obtaining the rent, the suing for, or receiving the further arrears under a distress, or by other means, will not prejudice the ejectment. A landlord having got a verdict in ejectment for non-payment of rent before judgement, and after more than six months had elapsed, subsequently to the day of the demise in the ejectment, caused a distress to be made for rent due(*q*) prior to the service of the ejectment, which the tenant replevied: an application to stay the proceedings in ejectment was refused, because a distress, until productive, cannot be applied in reduction of the rent in arrear.

The judgement in ejectment for non-payment of rent can only be deemed an *inchoate* forfeiture, as the ordinary(*r*) consequences of the judgement and execution are suspended for six months; and by payment and acceptance of the rent, or by exhibiting a bill in equity within six months, and depositing the rent and costs in Court, and obtaining a decree for relief, the judgement is, in effect, vacated, and the lease restored. After judgement in ejectment for non-payment of rent

(*m*) Lessee Burchell *v.* Hanly, Batty, 17, note; Cornwalls, Minors, 1 Hogan, 146; Lessee Frood *v.* Fitzgerald, Armst. M. & Ogle, N. P. Rep. 408.

(*n*) 9 Anne, c. 8, s. 7, Irish; 8 Anne, c. 14, s. 6, English.

(*o*) 2 Howard's Law Exch. 104, in the note; Jack *dem.* Law *v.* Donnelly, MSS. Easter, 1818, in the Common Pleas, Ap-

pendix, No. 23.

(*p*) Pennant's case, 3 Rep. 63, B. Cro. Eliz. 553-572, S. C.

(*q*) Lessee Ld. Ashbrook *v.* Dowling Batty, 13; Doe *dem.* Holmes *v.* Darby, 8 Taunt. 538; 2 Moore, 581, S. C.

(*r*) Ld. Kenmare *v.* Supple, Vern. 4 Scr. 7; O'Reilly *v.* Fetherston, 4 Bligh Parl. Ca. 187, N. S.

and before execution executed, the landlord may within six months after the day of the demise laid in the ejectment, distrain for the rent on account of which the ejectment(s) was brought, because if the judgement did not put an end to the estate derived under the lease, then the relation of landlord and tenant continued, and the distress by the landlord could not be a trespass; and if the judgement had the effect of putting an end to the tenant's estate, then the seventh section of the Irish Statute(t), 9 Anne, c. 8, was applicable to the case, and warranted the landlord in distraining.

84. It has been decided upon a writ of error, that after judgement in ejectment for non-payment of rent and execution executed, the forfeiture(u) may be waived by the acts of the parties: Edmond Malone, by lease made in 1771, demised to Anthony Malone for three lives renewable for ever: an arrear of rent having accrued due, Edmond Malone, in 1779, brought an ejectment for non-payment of rent, and in Hilary Term, 1780, marked his judgement. Anthony Malone having died soon afterwards, the writ of possession was, on the 21st of October following, executed: but the heir at law of Anthony, and his under-tenants, were suffered to continue in the unmolested enjoyment of the lands until the year 1800, when they were dispossessed under a writ of *habere*, grounded on an ejectment on the title brought by Edmond for recovery of the premises: in Easter Term, 1804, the heir of Anthony, who was one of the *cestuique vies* in the original lease, brought his ejectment on the title to recover back possession, and in answer to the eviction for non-payment of rent in October, 1780, gave in evidence various acts of Edmond between the years 1780 and 1800, recognizing the title under the original lease, as a subsisting interest, and, amongst others, proved several receipts passed by Edmond Malone in 1795 to under-tenants of the lands for rent due by the lessor of the plaintiff; a verdict having been found for the plaintiff in ejectment, a bill of exceptions was taken for receiving such evidence, which was overruled by the Common Pleas, and in 1806 the judgement was affirmed in error. In like manner, if a tenant be permitted to continue in possession of demised premises after an eviction for non-payment of rent, and, with the knowledge(v) of the landlord, to expend money in

(s) Dwyer v. Peacock, 2 Fox & Sm.
34.

(t) 9 Anne, c. 8, s. 7, Irish; 8 Anne,
c. 14, s. 6, English.

(u) Lessee Malone v. Malone, 1 Ball
& B. 32, note; Malone, in Error, v.

Frayne dem. Heighington, S. C.; Huds.
Comm. 441, Mich. 1806.

(v) Hume v. Kent, 1 Ball & B. 554;
and see *Ld. Cawdor v. Lewis*, 1 Younge
& Coll. 427.

building, or if the landlord, after such eviction, instead of entering in the occupation himself, or of demising to any other person, allows the evicted tenant to retain possession, and to cultivate and improve the land as if no ejectment had been brought, such acts of the parties will, in equity, be deemed a waiver of the forfeiture. An opinion is reported to have been expressed by Sir Anthony Hart, that an offer(*w*) made by the landlord, or his agent, to account with the evicted tenant for rents received from tenants in occupation of the premises subsequently to the execution of the writ of possession, was a waiver of the landlord's right to insist on the penal clause of the Statute precluding the tenant from relief, if the sum paid into Court happened, without design, to be insufficient for payment of the balance due for rent and costs. Where it appeared that after execution of the writ of possession, a dealing took place between the parties respecting the arrears of rent, and an actual tender was made by the tenant of the whole rent due, which was objected(*x*) to, solely on the ground that the costs of the proceedings at law had not been tendered; these costs being afterwards discharged, Lord Plunket held, there was a conditional acceptance of the tender, provided the costs should be satisfied, which prevented any bar arising from the omission to file a bill in Equity for relief within the period of six months, and a decree was pronounced for redemption on payment of all costs at law and in equity.

85. By the Ejectment Acts, a tenant is allowed a period of six calendar months for the redemption of demised premises, after execution executed, and a registered mortgagee is allowed three additional months for the same purpose: the forfeiture being only inchoate, and not absolute, during the time allowed for redemption, it is to be considered how the landlord is at liberty to deal with the premises during such period, as the Statutes are silent on the subject. Acceptance of the rent in arrear and costs by the landlord during the redemptionary period, is a waiver of the forfeiture(*y*), and, without filing any bill in Equity, restores the evicted lease, reverts the tenant's estate, and sets up all derivative interests in the demised premises, and all encumbrances which affected them prior to the eviction.

By the Irish Statute(*z*), 11 Anne, c. 2, the lessor of the plaintiff is

(*w*) *Sheridan v. Casserly*, Beatty, 249–251.

(*x*) *Butler v. Burke*, 1 Dru. & Walsh, 380.

(*y*) *Sheridan v. Dawson*, 1 Jones, 256; *Berney v. Moore*, 2 Ridg. P. C.

322; *Ld. Kenmare in Error v. Supple*, Vern. & Scr. 10; *Lessee Coyne v. Smith*, Batty, 71, note.

(*z*) 11 Anne, c. 2, s. 4, Irish; 4 Geo. II. c. 28, s. 3, English.

rendered accountable only for so much, and no more, as he shall really and *bond fide*, without fraud or wilful neglect, make of the demised premises from the time of his entering into actual possession thereof, and if what shall be so made by the lessor of the plaintiff happen to be less than the rent reserved on the lease, then the lessee, or his assigns, before he or they shall be restored to the possession, shall pay to such lessor, what the money so by him made falls short of the reserved rent for the time such lessor of the plaintiff held the lands. If it be probable, from the nature and value of the tenant's interest, that the premises will be redeemed, the landlord usually grants a lease for six months, or, in case of a mortgage, for nine months, to the evicted tenant, or to the occupying tenants, at the same rents for which they were previously answerable, requiring, however, that a solvent person shall join in the lease, as surety for payment of the stipulated rent, and performance of the covenants, and also for delivery of possession to the lessor on the determination of the demise. Where the arrear of rent is considerable, and solvent security cannot be provided, the premises are usually advertised to be let, either for six months, or for nine months, subject to redemption, and are then demised at a moderate rent to any solvent tenant for either of such periods, as circumstances shall render expedient; but if the property consist exclusively of a dwelling-house, or of a demesne unsuited to farming purposes, and the owner puts a steward into possession as a care-taker during the time allowed for redemption, such a landlord acting *bond fide*, is not answerable for what the premises might have produced, as he is not required to expose his property to the risk of dilapidations, or of destruction, although, if redeemed, he is answerable for whatever profit the premises yield in the interval.

86. The effect of a demise *bond fide* made by a landlord of premises evicted for non-payment of rent, to a third person for six months, pursuant to the Ejectment Acts, has not been settled; it is still doubtful whether such third person acquires an absolute indefeasible interest for six months, though the premises should be redeemed in the meantime, or whether the lease for six months is determined by the landlord's acceptance of the rent and costs before its regular expiration: upon the execution of the writ of *habere*, the landlord acquires the legal estate in the premises, which he has a right to transfer to a third person during the redemptionary period of six months, at a fair rent: the tenant's interest under the evicted lease may be reinstated in the meantime by the landlord's acceptance of rent and costs, or by the order of a Court of Equity on lodging the amount after bill filed, but it is sub-

mitted, that the evicted lease can only be set up, subject to the immediate demise for six months, derived out of the landlord's legal estate. If the landlord, after execution executed, demise the premises for six months, in order to avoid the responsibility which might otherwise be incurred by reason of his wilful negligence, in case of redemption, the lessee for six months cannot be made answerable for any proportion of the stipulated rent, if he shall be deprived of the possession before the regular expiration of the demise; and a lease for six months made subject to the contingency of being defeated on redemption, cannot be expected to produce any reasonable profit. The Court of Exchequer intimated an opinion, that the acceptance of rent and its payment by the landlord avoids the redemptionary demise; but their decision amounts to nothing(*a*) more, than that a tenant of part of demised premises, which are evicted for non-payment of rent, who redeems the entire interest, has no right to retain possession of the whole of the lands until his advance shall be repaid. An undertenant is obliged to accept possession of evicted premises, when redeemed by his immediate landlord, and becomes liable(*b*) to the covenants in his lease, and to the payment of the reserved rent from the gale day next ensuing.

(*a*) *Sheridan v. Dawson*, 1 Jones's Exch. Rep. 256.

(*b*) *Jones v. Cuthbert*, Vern. & S.

CHAPTER XIII.

NON-PAYMENT OF RENT.

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| <p>87. <i>Relief in Equity on filing Bill, and lodging Rent and Costs.</i></p> <p>88. <i>Forfeiture saved by Deposit of Rent ascertained, and Costs.</i></p> <p>89. <i>Costs at Law, how estimated.</i></p> <p>90. <i>Within what Time Bill must be filed, and Rent deposited.</i></p> <p>91. <i>Time enlarged by Landlord's Waiver, express or implied.</i></p> <p>92. <i>On Bill filed before Judgement, where Accounts complicated.</i></p> <p>93. <i>Rent claimed may be disputed on lodging the Amount within the Time limited.</i></p> <p>94. <i>Where equitable Set-off allowed on Bill filed after Judgment at Law.</i></p> <p>95. <i>Breaches of Covenant will not disentitle Tenant to Relief.</i></p> <p>96. <i>Any specific Interest in Lands evicted, entitles Party to redeem.</i></p> <p>97. <i>Saving of Rights of Mortgagees, by Statute 11 Anne, c. 2.</i></p> <p>98. <i>Redemption by Mortgagees out of Possession restricted to nine</i></p> | <p><i>Months.</i></p> <p>99. <i>Unregistered Mortgagee, not in Possession, may redeem within nine Months.</i></p> <p>100. <i>Mortgagees in Possession must redeem within six Months.</i></p> <p>101. <i>Redemption by Mortgagee enures to the Benefit of Lessee.</i></p> <p>102. <i>Bingham v. Pemberton.</i></p> <p>103. <i>Kent v. Roberts.</i></p> <p>104. <i>Whether Creditor by Judgement can sustain Bill for Redemption.</i></p> <p>105. <i>Mode of accounting where Tenant redeems.</i></p> <p>106. <i>Where Mortgagee redeems.</i></p> <p>107. <i>Landlord entering under irregular Proceeding.</i></p> <p>108. <i>Advance of Money to redeem Lands from Eviction.</i></p> <p>109. <i>Whether Landlord entitled to Deposit, after Tenant's Bill dismissed.</i></p> <p>110. <i>Costs of Suit in Equity.</i></p> |
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87. By the Statute(a) 11 Anne, c. 2, in case the tenant shall suffer judgement to be had and execution to be executed without paying the rent in arrear and full costs, and without filing a bill in Equity for relief within six calendar months after such execution, he, and all persons deriving under the lease, shall be barred and foreclosed from all remedy at law or in Equity, other than by writ of error, and the landlord shall thenceforth hold discharged of the lease: and by the Statute(b) 4 Geo. I. c. 5, in case the tenant shall suffer judgement to be had and execution to be executed, without paying the rent ascertained to be in arrear, with full costs, or depositing the same in a Court of Equity, on filing a bill within six months after such execution, the tenant, and all persons deriving under him, shall be barred and foreclosed from all remedy at law or in Equity, other than by writ of error. If the tenant pay the rent and costs, or file a bill in Equity for relief under the former Act; or if he pay the rent ascertained and costs, or

(a) 11 Anne, c. 2, s. 2, Irish; 4 Geo. I. c. 28, s. 2, English.

(b) 4 Geo. II. c. 5, s. 3, Irish.

deposit the amount on filing a bill in Equity under the latter Act, he shall not be barred or foreclosed : the effect of both Statutes in respect of paying the rent and costs, or filing a bill in Equity, is the same, although the copulative(*c*) is used in one, and the disjunctive in the other, because the party interested was not required by the Statute, 11 Anne, to deposit the rent and costs on exhibiting his bill, and the alternative of paying the rent, or lodging it in a Court of Equity, is allowed by the subsequent Act. Upon a bill filed under the Statute, 11 Anne, c. 2, before execution executed for the purpose of redeeming a lease evicted for non-payment of half a year's rent, the tenant can only obtain an injunction on the terms of lodging in Court such sum of money as the landlord shall, in his answer, (*d*) swear to be due for rent above all just allowances, within forty days after a full answer shall be filed : but if the landlord get possession of the demised premises in an ejectment under this Act, and the tenant exhibit his bill for relief either before execution executed, or within six months afterwards, he is not obliged to lodge any money in Court, either for rent or costs, before the hearing of the cause, when a decree will be pronounced according to the circumstances of the case. It is very doubtful, however, whether any Irish Court of Equity would grant an injunction(*e*) to restrain proceedings in ejectment for non-payment of rent, as the redemptionary period allowed by the Ejectment Acts, begins to run from the time of executing the writ of *habere*, and an injunction would have the effect of enlarging that period for the benefit of third persons interested in the redemption, to the landlord's prejudice.

It has been observed that a mere tender of rent and costs, although made within the period allowed for redemption, is not sufficient to re-vest the tenant's estate, and that the only(*f*) mode of restoring the evicted lease after execution executed, where a year's rent or more is ascertained to be due, is by the landlord's acceptance of the rent and costs, or by filing a bill in Equity, and lodging in the Bank of Ireland, with the privity of the Accountant General, to the credit of the cause, within the prescribed period, the rent ascertained to be due at the time of the service of the ejectment, with the full costs at law, under an order of the Court, which must be procured for that purpose.

88. In order to save the forfeiture, it is only requisite to bring into

(*c*) Lord Kenmare *v.* Supple, Vern. & S. 5, by Lord Clonmel, C. J.

(*d*) Bowser *v.* Colby, 1 Hare's Rep. 109; M'Ineherny *v.* Galway, Jones & C. 247.

(*e*) Clancy *v.* Roberts, 1 Irish Eq. Rep. 21; Ivess *v.* Hunt, Flan. & K. 408.

(*f*) Lord Kenmare, in Error, *v.* Supple, Vern. & Sc. 1; Wallis, 362, S. C.

Court the sum ascertained by affidavit, or found by verdict to be due for rent at the time of the service(*g*) of the ejectment, together with the full costs at law, but the tenant will only be restored to the possession on payment of such further sum as shall have accrued due during the suit in Equity, after giving credit for so much, as the landlord really and *bonâ fide* without fraud, deceit, or wilful neglect made of the premises from the time of his executing the writ of possession. On a redemption bill filed by a tenant on the 13th of November, it appeared that the writ of *habere* had been executed on the 13th of May, and that the tenant lodged(*h*) in Court the sum of £630, being the rent due at the time of the service of the ejectment: the affidavit to ascertain the rent was filed on the 9th of May, and stated that a sum of £630 was due at the time of the service of the summons in ejectment, and that a sum of £210 had subsequently become due for rent, and was unpaid: by order of the Court of Law the rent was ascertained at £840, and it was insisted, that the sum so ascertained to be due at the time of executing the *habere* ought to have been deposited in Court, but Lord Manners decided, that the forfeiture was saved, by bringing into Court the sum ascertained by affidavit to be due when the ejectment was brought, though a Court of Equity would not order the tenant to be restored until all the rent which incurred due should be discharged.

89. It is not only requisite that the rent, but the full costs at law shall be paid, or lodged in Court within six months after execution executed: full costs are construed to be all fair and reasonable expenses incurred by the landlord in recovering his rent at law, to the exclusion of disbursements of extra-liberality or generosity; and a tenant coming to redeem(*i*), is entitled to be present at the taxation of the costs by the proper officer, and is not concluded by an *ex parte* taxation, in his absence, obtained by the landlord, and a re-taxation of the costs, if required by the tenant, will be ordered by the Court of Equity; a Court of Law would probably direct the costs to be taxed, on application before bill filed, and within the six months, but as the terms of redemption(*j*), after bill filed, can only be regulated in Equity, an application for taxation of the costs at law, without the directions of a Court of Equity for that purpose, will not be granted. After execution exe-

(*g*) Lessee Gillespie v. Blackwood, 2 W. Law Exch. 73.

(*h*) Lynch v. O'Hara, MSS. Chanc. 66. 11th June, 1820, by Lord Manners.

(*i*) Flattery v. Malone, 1 Moll. 464.

(*j*) Lessee Malone v. Keogh, Batty,

cuted in an ejectment for non-payment of rent, the landlord's attorney furnished a bill of costs, leaving blank spaces for sums(*k*) with respect to certain charges, and the tenant, on filing his bill for redemption, deposited the rent, and also a sum exceeding the amount of the costs furnished, so far as the charges were specified in figures, but disregarding the items to which sums were not annexed, and it was decided that if the tenant lodged so much of the costs as was specified in figures the forfeiture would be saved, though, in fact, it should appear on taxation that the full costs exceeded such estimate: the full amount, however, must be satisfied, before he can be restored.

90. The periods of six months allowed to the tenant(*l*) for redeeming, and of nine months allowed to the mortgagee, are deemed calendar months, and are to be reckoned exclusive(*m*) of the day of executing the writ of possession, and the sheriff's return of the execution of a writ of *habere* on a specified day, does not afford conclusive(*n*) evidence in a suit for redemption, that possession was then actually delivered. In a suit by a tenant to redeem, it appeared that the bill was, in fact, filed on the opening of the office on Monday the 7th day of March, but was then received and certified(*o*), as if it had been filed on Saturday the 5th day of March, which was the last day of the period of six months limited for redemption, and Lord Manners considered he was bound by the officer's certificate.

A writ of possession having been executed on the 18th of July, 1824, the evicted tenant exhibited his bill in the Exchequer on Saturday the 17th day of January following, and at a late hour on the same day obtained an order(*p*) for liberty to lodge £527 8s., for rent and costs, in the Bank of Ireland, with the privity of the accountant-general, but the Bank being then closed, the money was not deposited until Monday the 19th of January, and a certificate was given to that effect; upon the application of the tenant, it was ordered by the Court, on the 7th day of May, 1825, that the lodgement of the rent and costs should be receipted on the 17th, instead of the 19th of January, and that the accountant-general should certify accordingly: this order, however,

(*k*) *Flattery v. Malone*, 1 Moll. 463.

(*l*) *Devereux v. Lady Bradstreet*, Wallis, 338; 2 Sch. & Lef. 529, cited; *Biddulph v. St. John*, 2 Sch. & Lef. 521.

(*m*) *Dowling v. Foxall*, 1 Ball & B. 193; *Lester v. Garland*, 15 Vesey, 248; *Barron v. Moore*, 1 Law Rec. 251; *Bodkin v. Vesey*, 1 Jones, 139.

(*n*) *Fitzgerald v. Hussey*, 1 Irish Eq.

Rep. 319; *Gyfford v. Woodgate*, 11 East, 297.

(*o*) *Foley v. Griffith*, 2 Moll. 318; *Vesey v. Bodkin*, 4 Bligh's P. C. 64-77; 1 Dow & Cla. 450, S. C.

(*p*) *Vesey v. Bodkin*, 4 Bligh's P. C. 64; 1 Dow & Cla. 455; *Bodkin v. Vesey*, 1 Jones, 139; *Barron v. Moore*, 1 Law Rec. 251.

sed by the House of Lords on appeal, and Lord Wynford ob-
 was doubtful upon the affidavits, whether the money was
 the 17th of January, and that the reversal of the order would
 lice the tenant, if he could prove that the money was ready
 lay: in pronouncing judgement in this cause(*q*) upon the
 Chief Baron said, that the evicted tenant had until the night
 the 18th of January to pay the rent and costs, and as the
 led on the 17th of January, if he had the money on that day,
 een prevented from lodging it by a fatality, a different case
 e been presented: if the tenant had the money on the 17th
 , and was too late to lodge it on that day, he ought to have
 he amount either then, or on the Sunday following, to the
 s attorney, but as no sufficient evidence was offered to esta-
 the tenant was prepared with the money on either day, the
 be dismissed with costs. So, an evicted tenant having been
 from arriving in Dublin by an extraordinary fall of snow,
 rent and costs at the residence of the Chief Baron in the
 Limerick, within the limited period, and the Exchequer(*r*)
 such deposit was sufficient to save the forfeiture.

victed tenant has been delayed by accident, which could not,
 y(*s*) diligence, have been anticipated or prevented, or if the
 occasioned by reason of any fraud or misconduct on the land-
 , or where the tenant, without disputing the amount of the
 entitled to an equitable set-off, which could not have been
 able at law, or if the tenant had the money in readiness, in
 ime to redeem the premises, but was prevented(*u*) from
 in bank by some fatality, and had previously tendered the
 the party, or his attorney, or if the delay had been induced
 / for an arrangement of the matter, in which the landlord is
 ith his tenant(*v*), equity will relieve against the forfeiture,
 he rent has not been deposited within the prescribed period,
 the tenant waits until the latest moment for bringing in the
 ought to bear the consequences of any accident(*w*) which

n <i>v. Vesey</i> , 1 Jones, 139, by	403, note; Lord Cawdor <i>v. Lewis</i> , 1
	Younge & Coll. 427.
<i>v. —</i> , 1 Jones, 146, cited;	(<i>u</i>) Bodkin <i>v. Vesey</i> , 1 Jones, 139.
1814.	(<i>v</i>) Devereux <i>v. Bradstreet</i> , 2 Sch. &
<i>arris v. Bryant</i> , 4 Russ. 91,	Lef. 529, Wallis's Rep. 338; Butler <i>v.</i>
Leach; Barron <i>v. Moore</i> ,	Burke, 1 Drury & Walsh, 380.
251, by Pennefather, B.	(<i>w</i>) Barron <i>v. Moore</i> , 1 Law Rec.
<i>y v. Darcy</i> , 2 Sch. & Lef.	251.

may prevent him from lodging it in due time, and the landlord is not to be involved in a vexatious account and in an expensive suit, by means of his tenant's negligence.

91. The rent in arrear having been offered to the landlady(x) on the last day of the six months allowed for redeeming, she observed that though it was the last day for tendering the amount, she would not take advantage of that circumstance, and appointed another day to receive the money, and it was ruled, that the landlady, by her promise made within the six months, waived every objection to the want of payment or formal tender within the limited time, and the tenant was decreed entitled to redeem on the usual terms. Where it appeared in a suit for redemption, that the sum due for rent and costs exceeded the money brought into Court by about thirty shillings, and that part of the rent claimed had been secured by the tenant's promissory note for £75, which remained unpaid, Sir Anthony Hart held(y), that as the note, though not paid, carried interest at law, its amount was severed from the arrear of rent, in such a manner as would induce a Court of Equity to exclude the case from the penal operation of the Statute, and to grant relief on proper terms.

92. If a bill be filed by a tenant *before*(z) judgement in ejectment, for the purpose of obtaining an injunction, and the landlord put in an answer, framed in such a manner, that the injunction could not be continued upon it, and if the answer be afterwards falsified, so that the case made at the hearing would maintain the injunction, the answer which the Court was compelled to rely on in the first instance, will not be suffered to affect the justice of the case, and the tenant will be placed in the same situation as if the answer had been originally fair: and if accounts between the parties have become so complicated, that a Court of law would be incompetent to examine them at *Nisi Prius*, with necessary accuracy, and it could appear only from the result of the accounts that the rent was not due, a Court of Equity will order the proper accounts to be taken, and if it be found that a year's rent was not due at the time of the service of the ejectment, a redemption will be decreed, though the rent was not deposited. Where a landlord claimed an arrear of rent, which became due whilst the tenant's father was in possession of the premises, and afterwards(a), when the son en-

(x) *Devereux v. Lady Bradstreet*, 2 Sch. & Lef. 529, Wallis, 338.

(y) *Sheridan v. Casserly*, Beatty, 249.

(z) *O'Connor v. Spaight*, 1 Sch. &

Lef. 305-308; *Kennington v. Houghton*, 2 Yo. & Coll. 620, in Chan.

(a) *Morton v. Drew*, 1 Sch. & Lef. 309, cited by Ld. Redesdale.

ered into possession, the landlord accepted the accruing rent from him, but during that time continued an account with the father, on which the landlord was entitled to a balance, and sought to recover the amount by ejectment against the son, it was ruled, that under such circumstances, the Statute ought not to be construed to cause a forfeiture.

93. Unless an evicted tenant file a bill in Equity within six months after execution(*b*) executed, no relief can be given on the question whether so much rent was actually due as was ascertained in the ejectment, because the Statute(*c*) meant to set that matter completely at rest, and to preclude any further investigation on the subject; but by prohibiting a bill for an injunction *before* judgement in ejectment, the right of the tenant to establish(*d*) credits against his landlord will not be barred, though some equitable ground(*e*) must be shewn, such as the existence of a complicated account between the parties, to warrant the interposition of the Court, where the rent and costs have not been lodged within the prescribed limit. If, however, the rent ascertained, together with the costs, be deposited within the period of six months allowed for redeeming, the tenant is at liberty to try the question in equity, whether so much rent(*f*) was really due, the payment of the money being merely required as a pledge that delay was not intended.

A Court of Equity will not interfere by injunction to prevent a landlord who has obtained judgement in ejectment for non-payment of rent, from executing(*g*) his writ of possession. The execution of the writ of *habere* is, by the Ejectment Acts, made, as it were, part of the landlord's title to hold the lands discharged from the lease: the term running which the tenant, or those deriving under him, may file a bill of redemption, is to be reckoned from that period; and if a Court of Equity should restrain the landlord from executing his writ of possession, on a judgement in ejectment for non-payment of rent, and the bill should afterwards be dismissed, any other person having an interest under the lease, or contract of the tenant, might file another bill within the redemptionary period of six months, upon lodging in

b) O'Mahony v. Dickson, 2 Sch. & Lef. 409-412; Gleeson v. Cooke, 1 Hogan, 298; 2 Molloy, 420, S. C.

c) 4 Geo. I. c. 5, Irish.

d) Gleeson v. Cooke, 1 Hogan, 298.

e) O'Mahony v. Dickson, 2 Sch. & Lef. 400; and see on the English Act, *Wise v. Colby*, 1 Hare's Rep. 109.

(f) O'Mahony v. Dickson, 2 Sch. & Lef. 410; Drought v. Redfoord, 1 Mol. 572.

(g) *Ivess v. Hunt*, 1 Flan. & K. 408, by Sir M. O'Loughlen; *Gleeson v. Cooke*, 1 Hogan, 268; *Clancy v. Roberts*, 1 Irish Eq. Rep. 21.

Court the rent and costs, as he might contend that until the writ of possession was executed the time allowed for redeeming did not begin to run, and that he was not affected by any proceedings in the suit in which the injunction was granted.

94. The tenant has also been relieved against a forfeiture for non-payment of rent, where he was entitled to an equitable set-off nearly equivalent to the rent in arrear, which could not have been rendered available at law: a landlord having a right to cut(*h*) and carry away timber trees growing on the demised premises, making compensation for any injury which the tenant should suffer, and the landlord having felled and disposed of the timber, brought an ejectment for non-payment of rent, and having obtained judgement by consent, the tenant shortly afterwards filed his bill for an injunction, claiming to set-off against the arrear of rent the unliquidated damages arising from the act of the landlord, and *affecting the land* in the tenant's occupation by felling and removing the timber. The tenant being unable to deposit in court the rent ascertained, the writ of possession was executed, and the period of six months having elapsed pending the suit in the Court of Chancery, by a decree which was affirmed on appeal declared the tenant entitled to redeem, and that he should get credit out of the rent in arrear for the sum which was found to be owing for dilapidations, and reinstated him in the possession.

95. If the evicted tenant lodge in Court the rent and costs within the time prescribed, he will be entitled to relief against the forfeiture although he has committed(*i*) waste, or violated any of the covenants in his lease, as his statutable right to redeem will not be connected with any such extrinsic matter, so as to impose a preliminary condition on the tenant to make compensation for those injuries; nor will the litigious conduct of a tenant in defending an ejectment for non-payment of rent disentitle him(*j*) to relief upon a redemption bill, nor even to the costs of the suit in equity, if the misconduct of the landlord in resisting the redemption and refusing to comply with reasonable terms shall be deemed sufficient for charging him with the costs of the cause: and where a tenant holds two denominations of land from the same lessor by separate leases, and both farms(*k*) are evicted by

(*h*) *Beasley v. Darcy*, 2 Sch. & Lef. 403, note; *Woodward v. Ld. Lincoln*, Rep. temp. Finch, 86; and see *Lord Cawdor v. Lewis*, 1 Younge & Coll. 427.

(*i*) *Swanton v. Biggs*, Beatty, 170; 2 Moll. 14; *Fitzgerald v. Hussey*, 3 Irish

Eq. Rep. 319-322; but see *Bowser v. Colby*, Hare's Rep. 109-138.

(*j*) *Newenham v. Mahon*, 3 Irish Eq. Rep. 304; Longf. & T. 34, S. C.

(*k*) *Newenham v. Mahon*, 3 Irish Eq. Rep. 304; Longf. & T. 34, S. C.

separate ejectments for non-payment of rent, the tenant has a right to redeem one of the holdings without being obliged to redeem the other.

96. By the Ejectment(*l*) Acts, either the lessee or his assignee, or any other person deriving under the lease, is entitled to redeem on complying with the usual requisites. A specific interest, legal or equitable, either as assignee or undertenant(*m*), in the whole or in any part of the demised premises, confers a right to redeem, even against the consent of the immediate tenant, on exhibiting a bill in Equity for that purpose, and on bringing in the full amount of the rent and costs at law within the limited time; and as a partial redemption of the evicted premises cannot be permitted, an undertenant seeking to redeem, though holding only part of the lands, must discharge the entire rent due to the landlord, along with the costs, and the effect of such redemption is, to set up the lease of the immediate(*n*) tenant, and the interests of all persons deriving under the lease will be re-vested without any new lease being executed, and the covenants in the immediate lease, as well as in the several under-leases, become available in the same manner as if no eviction had taken place, and such redemption renders the immediate lessee subject to the covenants in his lease, although set up against his consent. It was formerly contended, that after execution executed the tenant's lease could only be set up by the decree of a Court of Equity, because the Statute enacts(*o*), that if the tenant shall be *relieved* in equity, he shall hold without any new lease; but it is now clearly settled that the landlord, by accepting the rent in arrear and costs, and by reinstating the tenant in possession, revests the tenant's title and renders it complete, and that the original lease is continued without any new lease and without any decree.

97. By the Irish Statute, 11 Anne, c. 2, in case the tenant, or those deriving under the lease, shall suffer judgement to be recovered and execution to be executed, without paying the rent in arrear and costs, and without filing any bill for relief in equity within six calendar months after such execution, then that he and they shall be barred and foreclosed from all relief at law or in equity, but a mortgagee out of possession is exempted from the operation of this Act: the effect

(*l*) 4 Geo. I. c. 5, s. 4, Irish; 11 Anne, c. 2, s. 4, Irish.

(*m*) Berney v. Moore, 2 Ridg. Parl. Ca. 310-321; Webber v. Smith, 2 Vern. 103; Malone v. Geraghty, in Chan. February, 1843; 5 Irish Eq. Rep. 549.

(*n*) 11 Anne, c. 2, s. 5, Irish; Berney v. Moore, 2 Ridg. Parl. Ca. 322; Sheridan v. Dawson, 1 Jones's Exch. Rep. 256.

(*o*) Ld. Kenmare in Error v. Lessee of Supple, Vern. & Scr. 10.

of the foreclosure(*p*) of the tenant's interest under this Statute, where there is a subsisting mortgage, is to transfer the equity of redemption in the lease to the landlord, the object of the Statute being to defeat the tenant's interest under the lease, and to preserve the security of the mortgagee who had not entered into possession.

98. In order to obviate the inconvenience resulting from the general saving of the rights of mortgagees, a clause was introduced into the subsequent(*q*) Statute, 8 Geo. I. c. 2, limiting the mortgagee's right to redeem, and it was thereby enacted, that if a mortgagee, *out of possession*, who was served with the ejectment, did not pay the rent and costs within nine months after execution executed, he should be barred of his remedy at law, and foreclosed from all relief in equity on account of the mortgage, and that the landlord should hold the demised premises discharged not only from the lease, but *from the equity of redemption*.

99. A mortgage registered within six months after its execution will not be defeated by ejectment for non-payment of rent of demised premises unless the mortgagee be served; but a mortgagee who has not been duly served, will be barred of all relief, at law or in equity, unless within nine calendar months he pay, or tender the rent in arrears and costs; and though a mortgage is unregistered, or defectively registered, if the landlord has notice of its existence, he must(*r*) apprise the mortgagee of the proceedings, or else the suppression will, at law or in equity, be regarded as fraudulent, and relief will be afforded against the forfeiture: and even where the landlord has no notice of the existence of the mortgage, the mortgagee is entitled to redeem during the same period of nine calendar months after execution executed, as if the landlord is only enabled by the Statute(*s*) to proceed with his ejectment in the same manner as if the mortgagee had been duly served. The provisions of this Statute equally apply to a mortgage(*t*) of the equity of redemption, or second mortgage of the tenant's lease, and to a mortgage of part of the demised premises, and are expressly extended to, and include an assignee of a mortgage affecting the lands, if such assignment be registered within six months after its perfection.

100. A mortgagee in possession is treated by the Ejectment Act merely as a tenant in possession, and must, in that capacity, be served with the ejectment, and will be barred, unless he redeems within six months after execution of the writ of possession.

(*p*) Lessee Stuart v. Smith, Batty, 318; Lessee Murphy v. Ellison, 1 Law Rec. 324; Ellison v. Murphy, 4 Law Rec. 162, 1st series.

(*q*) 8 Geo. I. c. 2, ss. 4 and 5, Irish.

(*r*) Biddulph v. St. John, 2 Sch. Lef. 521-533.

(*s*) 8 Geo. I. c. 2, s. 5, Irish.

(*t*) Nesbitt v. Tredennick, 1 Ball. B. 22-41.

101. If the tenant omit paying the rent and costs within the period of six months after execution executed, and the amount be satisfied by the mortgagee after the expiration of that period, and within the prescribed term of nine months, it becomes an important consideration whether the lease, which is unquestionably continued by means of such redemption, for the benefit of the mortgagee, enures also for the benefit of the lessee after payment of the mortgage debt. The general impression entertained on this subject, prior to Lord Redesdale's holding the Irish seals, was, that a mortgagee, by redeeming within the nine months, restored the tenant's interest; but he intimated(*u*) doubts as to the effect of such redemption, though he never decided the question. Lord Manners, however, held, in many cases(*v*), that a mortgagee, by redeeming after the expiration of six months, and within the period of nine months, did not set up the lease for the benefit of the lessee, and that the tenant's interest, or equity of redemption in the demised premises, was at an end, or rather was transferred to the landlord, who had a right to redeem the mortgagee by payment of his demand, or that the mortgagee might by a decree in equity, foreclose and sell the interest under the lease for payment of his mortgage debt: upon the same principle, if the mortgagee of demised premises exhibited his bill in equity, after the expiration of six months, and within the period of nine months, for liberty to redeem the evicted lease, it was usual to add a prayer for foreclosure and sale of the interest in the lease, and it was held(*w*), that the evicted tenant, or mortgagor, was not a necessary party in such suit, because the mortgagee and landlord were considered to stand in the same relation to each other, so far as regarded the tenant's lease, as mortgagor and mortgagee.

102. Joseph Pemberton being seised(*x*) of premises situate at Clontarf, by lease for three lives, at the yearly rent of £38 13s. 6d., in Hilary Term, 1812, confessed a judgement in the penal sum of £600, payable on his own decease to James Smith, and afterwards by indenture dated the 23rd of June, 1813, which was duly registered, mortgaged the demised premises to Henry Bingham, for the purpose of securing payment of a sum of £1000 with interest: Joseph Pemberton continued in possession, and a year's rent having become due, the

(*u*) *Biddulph v. St. John*, 2 Sch. & Lef. 535.

(*v*) *Nesbitt v. Tredennick*, 1 Ball & B. 29-35; *Bingham v. Pemberton*, MSS. Chan. Hil. 1818; *Orpen v. Nettles*, 2 Moll. 410, MSS.; *Ellison v. Murphy*, 1 Law Rec. 332; 4 Law Rec. 161, 1st

series; *Sheerman v. Walker*, 1 Law Rec. 333, 1st series, in the note.

(*w*) See the note to *Rice v. Griffin*, 1 Molloy, 408; *Orpen v. Nettles*, 2 Molloy, 410.

(*x*) *Bingham v. Pemberton*, MSS.

landlord, George Vernon, brought an ejectment for non-payment of rent, which was served on the mortgagee, and other necessary parties, and judgement being marked, the writ of possession was, on the 3rd of June, 1816, duly executed: the rent remaining unpaid, Henry Bingham, the mortgagee, on the 8th of January, 1817, after the expiration of six months, and before the lapse of nine months, paid all rent then in arrear, and costs to the landlord, and was put into *actual* possession of the demised premises. Joseph Pemberton having died, a bill in Equity was exhibited by Henry Bingham, the mortgagee, against the heir and personal representative of the lessee, and against Edmond Nugent, a mortgagee of the equity of redemption, and on the 1st of February, 1817, a decree was pronounced, whereby the Master was directed to take an account of the sum due to the plaintiff, Henry Bingham, on foot of his mortgage, and also an account of the sum due to the subsequent mortgagee, and of the sums due on foot of all prior encumbrances. On the 17th of November, 1817, the Master made his report, stating the sums due to the several creditors by mortgage and judgement, and as the premises would be utterly insufficient to pay the plaintiff's demand, and the prior judgement debt, the Master, at the request of the parties, submitted to the Court, whether the judgement after the redemption by the mortgagee, continued a lien on the premises. The cause coming on to be heard on the Master's report, Lord Manners, on the 16th of February, 1818, ordered, that the facts should be stated in a case for the opinion of the Common Pleas, as to whether the conusee of the judgement had any, and if so, what remedy at law upon his judgement against the freehold estate. The Common Pleas(y) certified their opinion, that the conusee of the judgement had no remedy at law against the freehold estate, inasmuch as the freehold estate created by the lease to Joseph Pemberton, was avoided and determined by the proceedings in ejectment, and was not set up again by any of the subsequent circumstances stated to have taken place between the lessor and mortgagee.

This doctrine never was recognized by the Exchequer, though it was considered to be the settled law(z) of the Court of Chancery: the subject has, however, been re-considered, on appeal(a) from a decree of the Exchequer, and the question is now definitively settled(b) by

(y) Bingham v. Pemberton, C. B. Hilary, 1819, MSS. Appendix, 22, by Fletcher, Moore, and Johnson, Justices (Lord Norbury dissenting).

(z) See the observations of the late Master of the Rolls, Sir William Mac

Mahon, in Ellison v. Murphy, 1 Law Rec. 333, 6th May, 1828.

(a) O'Reilly v. Fetherston, 4 Bligh's Parl. C. 161, N. S.; 2 Dow & Cl. 39, S. C.

(b) Lindsay v. Maxwell, 21st April,

the decision of the House of Lords, affirming the Exchequer decree, and determining, that if the rent and costs be paid by the mortgagee, within the period of nine months, the lease being continued for his benefit, must have continuance, effect, and operation for the benefit of the lessee, and of all persons deriving any benefit under him : Lord Lyndhurst, in pronouncing judgement, said, he thought the true construction(c) of the Statutes(d) was, when there is not a mortgage, and the money has not been paid in six months, the landlord holds the land entirely freed from the effect of the lease ; and if there is a mortgage, and the money is not paid within nine months, he holds the land freed from the operation of the lease, as it respects both tenant and mortgagee : that by the Statute(e), 8 Geo. I. c. 2, if the rent and costs be not paid within nine months of the prescribed time, the landlord shall hold the premises freed from the mortgage and the *equity of redemption*, thereby implying, that if the money be paid within nine months, both the mortgage and the *equity of redemption* shall continue in force against him ; so that, not only there is no provision for transferring the equity of redemption from the tenant to the landlord, but so far as the provisions of the Acts go, they have directly a contrary effect.

103. By two indentures of lease dated the 26th of February, 1793, John Roberts demised part of the lands of Shanganagh to Edward Kent(f) for three lives renewable for ever, at rents amounting in the whole to the yearly sum of £214 10s. 11d., and subject to a renewal of ten shillings on the fall of every *cestuique vie* : by deed dated the 25th of June, 1796, and duly registered, the lessee mortgaged his interest in the demised premises to secure repayment of the sum of £500, which mortgage afterwards became vested in Thomas Richard Needham. Upwards of ten years' rent having fallen in arrear, the lessor as of Easter Term, 1810, brought two ejectments for non-payment of rent, with which both the lessee and mortgagee were duly served ; the lessee took defence, and judgements being marked on his consent, the lessor, on the 16th of February, 1819, executed his writs of *habere*, and obtained possession : the period of six months was suffered to elapse without redeeming the premises, but after that period had passed, and within the redemptionary period of nine months, the

831, before Ld. Plunket ; Sloane v. Mahon, 1 Drury & Walsh, 189 ; Ellison v. Murphy, 4 Law Rec. 161, 1st series.
(c) O'Reilly v. Fetherston, 4 Bligh's Parl. Ca. 161-188 ; 2 Dow & Cla. 39-8.

(d) 4 Geo. I. c. 5, Irish ; 8 Geo. I. c. 2, Irish.

(e) 8 Geo. I. c. 2, Irish.

(f) Kent v. Roberts, Eq. Exch. Mich. 1840 ; 3 Irish Eq. Rep. 279.

mortgagee declared his intention to redeem, when the landlord agreed to pay the mortgage debt on getting a reconveyance of the mortgaged premises, and by deed dated the 13th of November, 1819, after reciting the leases, the mortgage, the ejectments, and that the lessee had not redeemed within six months, the mortgagee, in consideration of the sum due on his mortgage, and of being *released from all arrears* of rent, reconveyed the mortgaged premises to the lessor, his heirs and assigns, for the lives of the *cestuique vies* named in the original leases. The lessee, Edward Kent, on the 20th of April, 1820, exhibited his bill against the lessor, John Roberts, stating the reconveyance of the mortgage to the lessor within the redemptionary period of nine months, and praying that the lessee should be declared entitled to redeem, on payment of the arrear of rent and costs, and of the mortgage debt, and after getting credit for what the lessor made of the premises, to be restored to the possession: the defendant having answered, issue was joined in the cause in Trinity Term, 1820: the lessee died in the year 1824, and the lessor died in the year 1826. In March, 1836, Edward Kent the younger, as heir at law, and personal representative of his father the lessee, filed his bill of revivor and supplement, and, upon the hearing, it was decided, that the privilege of redemption given to the mortgagee was to be exercised by him, not merely for his own benefit, but for the benefit of all other persons interested in the lease, and that any act by the mortgagee in effecting a redemption, enured to the benefit of all persons deriving under the lessee; and the plaintiff, Edward Kent the younger, was declared entitled to redeem the two leases, on payment of all rent in arrear, and the costs at law, and on payment of principal, interest, and costs due on foot of the mortgage, and an account was directed to be taken, of what the landlord really and *bonâ fide*, without fraud, deceit, or wilful neglect, made of the lands, from the time of his entering into the possession, and in case the plaintiff should redeem, he was declared entitled to a renewal of both leases, on payment of all rents, renewal and septennial fines, and interest: and the parties were ordered to abide their own costs of the cause.

The immediate lessee, or his assignee, is a necessary party(*g*) to a bill for redemption by a mortgagee or undertenant, as the mortgagor or immediate tenant ought to be present on taking the usual accounts.

104. It has not been decided, whether a judgement creditor(*h*) of

(*g*) *Adams v. St. Leger*, 1 Ball & B. 181.

Eq. Rep. 452, upon a bill for renewal; 3 & 4 Vict. c. 105, s. 21, Irish.

(*h*) But see *Smith v. Shannon*, 3 Irish

a lessee, or a person entitled to a rent-charge issuing out of demised premises can maintain a suit in Equity against the landlord, for redemption of an evicted lease: it is not requisite that such persons should be served with an ejectment for non-payment of rent, nor will they be allowed(*i*) to take defence to the ejectment, and unless fraud or collusion be shewn(*j*) between the landlord and evicted tenant, for the purpose of defeating the claims of persons entitled to encumbrances on the demised premises, it is considered that such a suit could not be sustained: however, a receiver has been appointed by the Exchequer under the Statute(*k*), 5 & 6 Will. IV. c. 55, at the suit of a judgement creditor(*l*) over premises held by virtue of a lease for lives, after eviction for non-payment of rent, and before the time allowed for redemption had expired, upon the undertaking of the creditor to discharge the sum due to the landlord for rent and costs.

105. The Statute(*m*), 11 Anne, c. 2, does not express in very intelligible language(*n*), the mode in which a landlord entering into possession is to be charged upon the tenant's redeeming, but the intention of the legislature appears to have been, that the landlord should only be accountable for what he really and *bonâ fide* made, or without fraud, deceit, or wilful neglect, might have made, of the demised premises while he remained in possession: it is not unusual that the decree for redemption should direct an account of what the landlord made, or without wilful(*o*) default might have made, of the premises, although the substitution(*p*) of default, in place of neglect, is not warranted by the Act, and the landlord, in some instances, may be prejudiced by the alteration: a landlord by omitting to let a dwelling-house and demesne during the time allowed for redeeming, might be subject to the imputation of wilful default, though not of wilful neglect, if it appeared that great risk of waste, dilapidations, or mismanagement, would be encountered by a demise for so short a term.

106. A mortgagee redeeming after the lapse of six months, and within the period of nine months, is entitled to an account of what the landlord really and *bonâ fide* made, or without(*q*) fraud, deceit, or wil-

(*i*) See Lessee Balfour v. Ejector, Vern. & Scr. 98.

(*j*) See Jones v. Kearney, 2 Irish Eq. Rep. 134.

(*k*) 5 & 6 Will. IV. c. 55, Irish; 3 & 4 Vict. c. 105, s. 21, Irish.

(*l*) Executors of Hill v. Kerr, 2 Irish Eq. Rep. 410.

(*m*) 11 Anne, c. 2, s. 4, Irish; 4 Geo. II. c. 2, s. 3, English.

(*n*) Swanton v. Biggs, 2 Molloy, 20.

(*o*) O'Reilly v. Fetherston, 4 Bligh's Parl. Ca. 174, N.S.; Biddulph v. St. John, 2 Sch. & Lef. 536; Orpen v. Nettles, 2 Moll. 410, MSS.

(*p*) Swanton v. Biggs, 2 Moll. 20; Callaghan v. Lord Lismore, Beatty, 224; M'Ineherny v. Galway, Jones & Carey, 247.

(*q*) Since the decision of the House of

ful neglect, might have made of the demised premises, subsequent to the execution of the writ of *habere*, and to have any balance found due by the landlord on such account applied in reduction of his mortgage debt, although if there had been no eviction, the mortgagee could not have rendered the tenant answerable for such rent.

107. A distinction is taken by Sir Anthony Hart between the mode of accounting where a landlord obtains possession under an irregular ejectment, and is to be regarded as a wrong-doer, and where the landlord, having entered under a rightful eviction, is required to restore the premises, and is sought to be made accountable pursuant to the Statute: in the latter case, the landlord is only chargeable for what he actually received, and not for the whole of the rents at which the lands had been previously let to undertenants, though if the landlord omitted to use due diligence in letting the premises, or in collecting the rents, he would be charged with a fair occupation rent, and by the express words of the Act, if the money which the landlord made, or, without wilful neglect, might have made of the premises, happened to be less than the reserved rent, the tenant would be answerable for such deficiency before he could be reinstated in the possession. However, where the landlord is to be treated as a wrong-doer, an account will be directed of what sums he made, or, without wilful default, might have made of the premises, from the time of his entering into possession, and if he occupied the lands, or set them along with other premises at an entire rent, the Master will be ordered to fix a fair occupation rent: if the demised premises did not produce, or the landlord holding such wrongful possession was unable to procure so much out of the lands as would be sufficient to satisfy the rent reserved by the lease, it would require very peculiar circumstances to warrant the landlord in charging the tenant with the excess.

108. A party who advances money to save a leasehold estate from eviction for non-payment of rent, has a lien on the property so preserved, in preference to earlier charges affecting it: an encumbrancer having agreed to advance a sum of money to save lands from eviction for non-payment of rent, obtained a security by deed affecting the pre-

Lords in *O'Reilly v. Fetherston*, 4 Bligh's Parl. Ca. 161, mortgagees can only have an account in the same form as the tenant.

(*r*) *Orpen v. Nettles*, in Chan. 23rd June, 1820, MSS.; 2 Moll. 411, S. C.; *Biddulph v. St. John*, 2 Sch. & Lef. 535.

(*s*) *Callaghan v. Ld. Lismore*, Beatty, 223.

(*t*) 11 Anne, c. 2, s. 4, Irish; 4 Geo. II. c. 2, s. 3, English.

(*u*) See the decree in *Sullivan v. Jacob*, 1 Moll. 472-479.

(*v*) *Callaghan v. Ld. Lismore*, Beatty, 227.

payment of the amount, and afterwards discharged the rent and redeemed the premises; the property having been sold in satisfaction of the mortgage for payment of debts, it was(*w*) ruled that the sum so received was to be deemed a lien on the lands in preference to the earlier encumbrancers, and as the security given for such advance was unavailing, that the claimant was remitted to her original position.

A tenant having filed his bill to redeem, and deposited in Court the sum of rent and costs, will not be suffered to dismiss his bill and take back his deposit, on finding(*x*) the balance reported due by him to be less than he anticipated, and though the bill be dismissed, the Court will order the sum so lodged to be paid over to the landlord in part satisfaction of the sum reported due. Lord Eldon says, that where a bill is brought by a plaintiff into Court, and the bill is dismissed on demurrer, the Court cannot direct the money to be paid back to the plaintiff; but where a tenant, who filed a bill for redemption, by neglect dismissed his own bill before hearing(*z*), Sir Michael Foster held, that the plaintiff was entitled to get back the residue of his deposit, after payment of the defendant's costs.

Where a bill to redeem evicted premises being rendered necessary, on account of the tenant in omitting to discharge his rent, he will be refused relief on the terms of paying the costs incurred in the suit, unless it shall appear, on taking the account, that a full year's rent was in arrear at the time of the service of the ejectment, or that the prosecution of the suit in equity had become necessary in consequence of the landlord's misconduct.

A mortgagee being decreed entitled to redeem, on payment of the principal, and of the *full* costs, both at law and in equity, it was ruled that in case such rent and costs, after all just credits, should not be paid within one calendar month after the Master should have reported, then that the bill should stand(*b*) dismissed with costs, and that on payment by the mortgagee, he should be entitled to have

Re v. Hales, 5 Irish Eq. Rep. 325.
Re v. Williams, Wallis, 325.
Re v. Ld. Lismore, 2 Moll. 413.
Re v. Baldwin, 2 Irish Eq. Rep. 304.
Costello v. Hunt, 2 Irish Eq. Rep. 304.
Butler v. Ld. Portarlington, & Warr. 65.
Re v. Jackson, 2 Russ. 351–

Re v. Dennehy, Flan. & K. 323; and see

Haynes v. Colthurst, 1 Hogan, 377;
Blennerhassett v. Scanlan, 1 Hogan, 363;
Bowser v. Colby, 1 Hare's Rep. 109–142.

(*a*) *Reade v. De Montmorency*, 5 Ir. Eq. Rep. 40; *Newenham v. Mahon*, 3 Ir. Eq. Rep. 304; *Malone v. Geraghty*, 5 Irish Eq. Rep. 549.

(*b*) *Biddulph v. St. John*, 2 Sch. & Lef. 535; *Wilde v. Manley*, 2 Moll. 413; *Drought v. Redfoord*, 1 Moll. 572.

the amount repaid by the tenant. Where the Master's report in the cause finds that the whole arrear of rent has been discharged during the progress of the suit, out of the profits of the demised premises received by the landlord, Sir Anthony Hart considered that the tenant was entitled to indulgence(c), and having ordered the costs to be taxed, allowed three months for their payment after the amount should be ascertained.

(c) *Drought v. Redfoord*, 1 Molloy, 572.

CHAPTER XIV.

CIVIL BILL.

DESEPTION.

*enabling Landlords to re-
Possession of deserted Pre-*

*nce between English and
Statutes on this Subject.*

*must be holden under written
ument, with Proviso of Re-*

onstitutes Desertion.

ation of viewing Justices.

*ation by Justices of deserted
ises.*

ate of viewing Justices.

s of Civil Bill for Desertion.

it to verify Contents of Civil

s of Process.

tution of Service of Eject-

*ment by superior Courts for de-
serted Tenements.*

12. *Proofs on Hearing of Civil Bill
for Desertion.*

NON-PAYMENT OF RENT.

13. *Remedy by Civil Bill for Non-pay-
ment of Rent.*

14. *— regulated by Ejectment Acts.*

15. *On whom the Process must be served.*

16. *Lands must be holden under In-
strument in Writing.*

17. *Contents of Civil-bill for Non-pay-
ment of Rent.*

18. *Proofs on the Hearing.*

19. *Civil Bill for Redemption.*

20. *Mode of Proceeding to redeem
evicted Premises.*

the Irish Statute(a), 56 Geo. III. c. 88, after reciting, that
re often sufferers by tenants running away in arrear and de-
ements demised, or *agreed(b) to be demised* to them, in
the landlord is obliged to resort to an *ejectment* for recovery
on, the expense of which, in many cases, exceeds the value
ment: *it is enacted*, that if any tenant holding any tene-
land, who shall be in arrear for one-half(c) year's rent, shall
tenement demised to him, or leave(d) the same uncultivated,
off the stock and crop, or otherwise abandon the same, so
ient distress may be had to countervail the arrears of rent
r the same, it shall be lawful for the landlord, or lessor, of
nt so deserted, or left unoccupied or uncultivated, to proceed
civil bill to obtain possession of the tenement so deserted,
occupied: and thereupon it shall be lawful for two or more
the peace of the county in which such tenement shall be,

a. III. c. 88, s. 1, Irish; 11
9, s. 16, English.

words "agreed to be de-
not in the English Act, 11
6.

English Act, a year's rent

is required to be in arrear.

(d) In the English Act, the word
"and" is inserted.

(e) The words in italics are not in the
English Statute.

having no interest in the demised premises, at the request of such landlord or lessor, his bailiff or receiver, to go upon and view the same between the hours of ten o'clock in the forenoon, and four o'clock in the afternoon, and having fully ascertained, to their satisfaction, by examination of witnesses, or by their own view, that the premises are so deserted by the tenant(*f*), or left so unoccupied, and without sufficient distress to countervail the arrears of rent then due, to certify to the assistant-barrister, chairman of the sessions of the peace, or recorder, before whom such proceeding by civil bill shall be, under the hands and seals of such justices, that they have together viewed the premises in question, fully describing the same, and that the same appeared to them deserted or unoccupied, and without any distress thereon sufficient to countervail the arrear of rent, ascertained by affidavit of the landlord or lessor, his bailiff, or receiver, to be due thereon, after all fair and just allowances: which certificate, when proved to have been duly executed, shall be sufficient and conclusive evidence of the facts therein contained, unless the same shall be disproved by contrary evidence, to the satisfaction of the judge before whom the case shall come, upon such civil bill, or appeal from such civil bill: and it shall be lawful for such landlord, after obtaining from the justices the certificate, to serve a process(*g*) on such civil bill, together with a copy of such certificate, on the tenant against whom such proceeding shall be had, if such tenant can be found; and if not, to affix such process, and a copy of such certificate, upon some notorious part of the said tenement, and also upon the door of the parish church, if the same shall be in repair, and also upon the door of the Roman Catholic Chapel, if any, within the parish, summoning the tenant or tenants, who may have so deserted the premises, personally to appear before the assistant-barrister, or before the chairman of the sessions of the peace, or recorder, as the case may be, on a day certain, at a quarter sessions to be held for the division of the county in which the premises, or any part of them, shall be, or at a court to be held before the recorder for the hearing and determining of civil bills, in cases where the premises shall be situate within the county of the city of Dublin, to answer the bill of the landlord or lessor: and that it shall be lawful for the judge, upon such civil bill, and upon proof of such certificate, by any person who may have witnessed its execution, and upon proof(*h*) that *at least* one half year's rent was due to such

(*f*) In the forms annexed to the Irish Statute, 58 Geo. III. c. 39, the word "and" is inserted.

(*g*) See the Stat. 58 Geo. III. c. 39,

s. 2, Irish.

(*h*) See Stat. 58 Geo. III. c. 39, s. 4, Irish.

or lessor, for the premises, when such proceeding was commenced and that the process on such civil bill, and a copy of the certificate were served, or that the tenant could not be found, so that the bill could be served, and then upon proof that such process and the certificate had been duly affixed upon the several places to this Act ; and upon hearing the tenant, in case such tenant appeared, and such evidence as shall be offered on behalf of such tenant or any shall be offered, and duly considering the same, to decree against the tenant or lessor, to be put into possession of the premises.

The corresponding English Act(*i*), upon which the Irish Statute requires that the premises sought to be recovered by reason of forfeiture, shall be holden at a rack-rent, that one year's rent shall be paid, that there shall be an actual demise, and enables the viewing of the premises upon their certificate, to put the landlord into possession, discontinue the lease, while the certificate of the justices, under the Irish Statute, is made evidence to warrant a decree for possession by the barrister. Subsequently to the Irish Statute(*j*), an Act(*k*) passed in England by which the provisions, powers, and remedies against landlords by the English Statute, 11 Geo. II. c. 19, in case of a tenant deserting demised premises, and leaving them uncultivated and unoccupied, without sufficient distress, were extended to the tenants holding any lands or tenements at a rack-rent, who shall be liable for one *half year's* rent, and who shall hold such premises by lease or demise or *agreement, either written or verbal*, and although no right of re-entry, be reserved to the landlord in case of default of rent.

The preamble to the sixteenth section of the English Statute, 11 Geo. II. c. 19, recites the expense and delay which landlords were in recovering by ejectment, and Lord Kenyon held, that this Statute only applied to cases where the landlord could support an action, and therefore where justices declined proceeding under the Statute to put a landlord into possession of deserted(*l*) premises, because the tenant was only a lodger, it was ruled that the case was not within the Statute unless the demised premises were holden by lease containing a proviso for re-entry : and in a subsequent case, Lord Ellenborough held that a right of re-entry(*m*) must exist, in order to enable a landlord to avail himself of the benefit of this Statute. The preamble to the

11 Geo. II. c. 19, s. 16, English.
 11 Geo. III. c. 88, Irish.
 11 Geo. III. c. 52, English ; there
 pending Irish enactment.

(*l*) Woodfall's Landlord and Tenant,
 by Harrison, 815.

(*m*) *Ex parte* Pilton, 1 B. & Ald. 369.

Irish Statute, 56 Geo. III. c. 88, also recites the necessity of resorting to an ejectment for recovery of possession of deserted premises, and the expediency of providing a less expensive mode for that purpose, following the English Act in that respect; and hence it is to be inferred that in proceeding under the Irish Act for recovery of possession of deserted tenement, it is requisite that the premises shall be held either under a lease or an agreement *in writing* for a lease containing a clause of re-entry for non-payment of half a year's rent. This Statute(*n*), which enables an inferior jurisdiction to defeat a lease for desertion, whatever may be the amount of the reserved rent, or the proportion which such rent bears to the value of the land, and without allowing any time after execution executed for redeeming the premises, ought to receive a strict construction, and great caution should be observed in following its provisions with accuracy.

4. It is difficult to define, with any degree of precision, what shall constitute a desertion of demised premises within the meaning of the Statute, and the legislature, with a view of guarding the tenant against surprise, have required the opinion of two justices of the peace, and have allowed any party liberty to controvert such opinion, or finding of the justices, by producing contradictory evidence before the assistant-barrister, and upon appeal from his decree before a judge of assize. In order to enable a landlord to defeat his tenant's interest in demised premises by reason of desertion, it is requisite there should be, at least, half a year's rent in arrear, and that there should not be any property on the premises, accessible to the landlord's distress sufficient to countervail the arrear: in the absence of any available distress, the nature and quality of the premises must be considered, for the purpose of ascertaining what is to be construed an abandonment by the tenant: the tenant's holding may consist either of a dwelling-house with appurtenances, or of a dwelling-house and farm, or of a farm without any residence, and the whole, or a part of such tenements may be in the occupation of undertenants.

The Statute(*o*) enables a landlord to proceed by civil bill, when his tenant deserts the demised premises, or leaves them uncultivated, or carries off the stock or crop, or otherwise abandons them, without leaving sufficient distress; and it appears by the form of civil bill decree annexed to the Statute(*p*), 58 Geo. III. c. 39, that the premises must be deserted and *left unoccupied* by the tenant without adequate

(*n*) 56 Geo. III. c. 88, Irish.
 (*o*) 56 Geo. III. c. 88, Irish.

(*p*) 58 Geo. III. c. 39, Irish.

distress: the mere want of cultivation is not sufficient to authorize landlord to defeat his tenant's interest, unless the premises are deserted and left unoccupied: there must be either a total desertion, or such an abandonment as will defeat the landlord's remedy by distress, and the non-cultivation(*q*), and removal of the stock and crop, are only enumerated as means by which such an effect may be produced, and not as distinct offences. The tenant of a dwelling-house(*r*) and on having suffered a year's rent to become due, two justices of the peace, acting under the English Statute, viewed the premises, and ascertained that the tenant's goods were removed, but they found his wife and children occupying the house, and that the only furniture it contained consisted of a few chairs, which the tenant's wife said belonged to a neighbour, upon which the justices granted their certificate, and possession was delivered: the tenant having appealed from the order of the magistrates, the judges of assize held that the premises had not been deserted within the meaning of the Act, and awarded restitution. However, where a tenant holding a house in New Bond Street, at a yearly rent of £300, ceased for several months to reside, or carry on business there, and having left no furniture or goods on the premises, except a French stove, and the royal coat of arms, which had cost £150, and were not of sufficient value to discharge the rent in arrears, it was ruled(*s*) to be a clear case of desertion, though the landlord was aware where the tenant might be found, and though the justices, at the time of making the view, found a person in the house, who was employed by the tenant to shew the premises. If a tenant's holding consist of a farm of arable and pasture land, without any dwelling-house, and half a year's rent, or upwards, is in arrear, without any intervening distress, and the stock and crops are removed, and no preparation made to cultivate the soil, and the tenant has absconded, his interest may be defeated in consequence of the abandonment, but if a substantial part(*t*) of the land be occupied and cultivated by an under-tenant, though the dwelling-house and chief part of the farm is deserted by the immediate tenant, a proceeding under the Statute for desertion cannot be supported.

5. The Statute directs that two or more justices of peace of the county, having no interest in the demised premises, at the request of

q) Pennefather v. Gleeson, Napier's Digest, 124-128, by Bushe, C. J.

r) Ashcroft v. Bourne, 3 Barn. & W. 684; Savage v. Dent, 2 Stra. 4; 2 Selw. N. P. 736; Bull. N. P.

(*s*) Pilton, *ex parte*, 1 B. & Ald. 369; Doe *dem.* Atkins v. Roe, 2 Chitty's Rep. 179.

(*t*) Pennefather v. Gleeson, Nap. Dig. 124-129; Stewart's Comments, 25, same case.

the landlord, his bailiff, or receiver, shall go upon and view the lands the justices cannot lawfully enter upon demised premises, though deserted, unless a request or complaint shall be made by the landlord or his agent, stating the tenant's desertion, and requiring them to go upon and view the land, for the purpose of certifying the facts to the assistant-barrister, pursuant to the Statute: such a request or complaint need not be upon oath(*u*), and may be made *verbally*, but it is prudent for persons undertaking such a duty, to require a request or complaint in writing. The certifying justices must be quite free from any beneficial interest in the land, and they should be wholly unconnected with the landlord, and therefore, neither the landlord's agent, nor any person nearly related to, or closely connected with him, ought to act as a magistrate in viewing the premises.

6. The two justices must go upon, and view the lands at the same time, between the hours of ten o'clock in the morning and four in the afternoon, and if they shall be satisfied, upon their own view and examination, that the demised premises are deserted, and left unoccupied, and that at the time of their inspection, no distress is to be found on the lands, or that any distress to be found is utterly inadequate to discharge the rent then due out of the premises, they need not examine any witness on the subject, but if any doubt should exist as to the desertion, or as to the value of the distress, they should examine, upon oath, disinterested witnesses who can supply satisfactory information: diligent search should be made in every part of the demised premises, and in every dwelling-house and building on the lands into which the justices can gain admittance(*v*), for the purpose of discovering any distrainable property. The value of any crop growing on the lands should be taken into account in estimating the adequacy of the distress, and if such crop bear any reasonable proportion to the extent of the farm, or the arrear of rent, the justices ought not to certify an abandonment. The amount of the rent due at the time of the view, after all just and fair allowances, must be ascertained by the affidavit of the landlord, or his agent, and should be sworn before one of the certifying justices, pursuant to the form(*w*) given by the schedule to the Act, in order(*x*) to warrant the justices in granting the requisite certificate.

7. The certificate of the viewing justices should pursue the form given in the schedule to the Statute(*y*), and should state the day and

(*u*) *Basten v. Carew*, 3 B. & Cr. 649; 5 D. & Ry. 558, S. C.

(*v*) See *ante*, 1082.

(*w*) 58 Geo. III. c. 39, in the Schedule of Forms.

(*x*) *Lockwood v. O'Brien*, Nap. Dig. 115.

(*y*) *Pennefather v. Gleeson*, Nap. Dig. 124-127.

year of the view, and that such view was made by them within the hours appointed by the Act, at the landlord's request, and should fully describe the demised premises, following, in this respect, the lease or agreement under which they are held, and should state the estimated contents of the lands, and the parish, barony, and county in which they are situate, the possession of the lessee or tenant, that the premises appeared to the justices to be deserted and left unoccupied, and that there was no distress on them sufficient to countervail the arrear of rent, being one-half year's rent (or the sum of £100, being more than half a year's rent), ascertained by the affidavit of the landlord thereof, (or of his bailiff), then due thereout, after all just and fair allowances. The certificate must be executed by the justices under their respective hands and seals, in the presence of a subscribing witness.

8. The seventh section(z) of the Statute requires, where the proceedings shall be grounded on desertion, that the civil bill shall specify the names of the landlord or lessor, and of the tenant or tenants, respectively, the nature of the tenancy, and the rent at which the premises shall be holden, the description of the premises, and the baronies or parishes wherein the same shall be respectively situated, the fact of desertion by the tenant, and the amount of rent due, after all fair and just allowances, and the insufficiency of distress to countervail the same; and the truth of the contents of the civil bill must be verified by the affidavit of the lessor or landlord, his known agent or receiver. It is unnecessary to specify the addition or place of residence(a) of the parties, plaintiff or defendant, in a civil bill for recovery of possession: in ordinary cases of civil bills, the residence of the defendant must be stated, for the purpose of shewing that he resides within the proper jurisdiction, but in civil bills to recover possession of land, the defendant's place of residence is wholly immaterial, as the jurisdiction depends on the locality of the premises. The yearly rent should be correctly stated(b) in a civil bill for desertion, and the amount of rent proved to be in arrear should be consistent in that respect with the certificate of the justices, for, if it should appear in evidence, that a lesser sum was due for rent than was ascertained by the landlord's affidavit, the certificate of the insufficiency of distress would be rendered nugatory.

The nature of the tenancy must be distinctly specified in the civil bill, and though it is prudent to adhere closely to the forms(c) given

(z) 56 Geo. III. c. 88, s. 7, Irish.

(a) See Stewart's Comments, 11, referring to the case of Mrs. Palmer, of Rush, ruled on appeal; Supplement to

Kinahan's Digest, 95; Napier's Dig. 114.

(b) See Longfield's Civil Bills, 95.

(c) Pennefather v. Gleeson, Nap. Dig.

by the Statute(*d*), so far as circumstances permit, yet any form to the like effect will be deemed sufficient: the civil bill must allege that the holding was under a demise (or *an agreement for a demise*), for a term of years, or for a life or lives, but it does not appear essential that the number of years, or the names of the *cestuique vies* should be set forth. A mis-statement of the nature of the tenancy, unless cured by the appearance of the defendant on the hearing of the civil bill, renders all the proceedings inoperative, and invalidates the eviction: a landlord having recovered possession by a decree, on account of desertion, in which the premises were stated to be holden(*e*) under an accepted proposal, dated the 2nd of October, 1812, for a lease for three lives and sixty-three years concurrently, it was proved on the trial of an ejectment, brought *after the lapse of fifteen years*, to recover back the possession, that a lease had been executed between the same parties, dated the 28th of April, 1814, for three lives and sixty years concurrently at the same rent, and it appeared that the term granted by the lease would expire one year sooner than the term in the accepted proposal: after verdict for the defendant, upon motion, pursuant to leave reserved, that the verdict should be entered for the plaintiff, the Exchequer ruled, that the civil bill decree could not be sustained, as it purported to evict an interest, which was not in existence when the decree was pronounced; and a verdict was ordered to be entered for the plaintiff. In this case the Court did not attribute as much importance to the great lapse of time, as such a circumstance has often received.

The description of demised premises inserted in the civil bill should, in all material parts, pursue, or should, at least, be consistent with the description contained in the instrument under which the tenements are holden: the civil bill need not set out the boundaries, nor refer to the occupation of former tenants, nor specify the right to any easement comprised in the demise, but should describe the denomination of land, or that part of the denomination demised by the lessor to the lessee, with the appurtenances, out of which the rent issues: the estate and interest of the lessee, and of all persons deriving under him, must be defeated by the civil bill decree for desertion, as there cannot be an eviction of parcel of the land, nor an eviction of any partial interest in the subject of the demise. The form given by the Statute for the magistrate's certificate, specifies both the parish, barony, and county, and states the contents of the farm in acres, roods, and perches, but the Sta-

129; Fox v. M'Tiernan, Longf. Civil Bills, 211.

(*d*) 58 Geo. III. c. 39.

(*e*) Lessee Coffey v. Rahilly, 1 Jones's Exch. Rep. 274; 3 Law Rec. 193, 2nd series.

tute, in this respect, seems to be only directory, and the statement either of the parish or barony, along with the county, will probably be deemed sufficient, and the omission of the acreable contents, where a precise description of the premises in other respects is inserted, will not vitiate the proceeding.

9. An affidavit must be made by the landlord, his known agent or receiver, verifying the truth of the contents(*f*) of the civil bill, as the Statute does not warrant such summary proceeding without(*g*) the oath of the party, or of his agent, that all the facts required to give the inferior court jurisdiction, and alleged by the civil bill, really exist: the affidavit should be sworn before the assistant barrister, and need not be positive, the belief(*h*) of the deponent being sufficient. Upon an ejectment brought for the purpose of impeaching an eviction under a civil bill decree for desertion, after default made by defendant at the hearing, the Exchequer held that an affidavit(*i*) verifying the contents of the civil bill, was a necessary preliminary to give the inferior court jurisdiction; but the decision, restoring possession to the evicted tenant, seems to have been founded upon fraud in obtaining the civil bill decree: and subsequently it was decided by the same Court, that the want of an affidavit(*j*) to verify the civil bill, was cured by tenant's appearance in the inferior court, and that no objection which could have been made on the hearing of the civil bill, or upon an appeal from the decree of the assistant-barrister, could be raised in an ejectment brought to impeach the validity of the civil bill decree. Upon the same principle, an objection that the certificate of justices of the peace required by the Statute, was not proved to have been given in evidence upon the hearing of the civil bill, will not be allowed, as the Court will presume(*k*) that all necessary proof was given for the purpose of obtaining the decree of the inferior court.

10. The process on the civil bill, with a copy of the certificate of the justices, must be served on the tenant against whom such proceeding shall be had, if he can be found, and if not, then such process and copy of the certificate must be posted upon some notorious part of the premises, and also upon the door of the parish church, if in repair, and upon the door of the Roman Catholic chapel, if any within the parish. The civil bill process and justices' certificate, should be served on the

(*f*) Lockwood *v.* O'Brien, Nap. Dig. 114.

(*g*) Lessee Moore *v.* Barlow, Nap. Dig. 135, MSS.

(*h*) *Ld. Waterford v. Harvey*, Nap. Dig. 117.

(*i*) Lessee Moore *v.* Barlow, Nap.

Dig. 131, MSS.

(*j*) Lessee Hillyard *v.* Day, cited 1 Jones's Exch. Rep. 276; Nap. Dig. 117; *Murphy v. Tracy*, Nap. Dig. 118.

(*k*) Lessee Coffey *v.* Rahilly, 1 Jones, 277, by Pennefather, Baron.

immediate^(l) lessee, or, according to the nature of the demise, on the heir, or personal representative of a deceased lessee, his or their assigns, and upon any undertenant who was in occupation of the whole or any parcel of the demised premises, immediately previous to, or at the time of the desertion: diligent inquiries should be made for the purpose of discovering the residence of every such tenant, so as to satisfy the assistant-barrister, either that none of them could be found, or that such of them as could be discovered^(m) had been duly served.

11. If demised premises are deserted, courts of justice in England will not order that posting a declaration in ejectment shall be deemed sufficient service, because the landlord ought to proceed for recovery of possession, as directed by the Statutes, for desertion: where demised premises consist of unfinished and uninhabited houses⁽ⁿ⁾, or where a dwelling-house is abandoned by the tenant, and the interior^(o) fittings of the house removed, the landlord is required to proceed under the Statutes for desertion: however, it is to be observed, that the English Statutes extend to all cases of desertion, and that the Irish Statute is much more limited in its operation, and does not afford similar advantage to the landlord: so that it is probable the Irish landlord would be allowed to proceed by ejectment, and that secondary service of an ejectment would be permitted in proper cases.

12. The proofs requisite to be made on the hearing of a civil bill for desertion, are the certificate of the justices, which must be proved by the subscribing witness to the instrument; the service of the civil bill process, and certificate, upon the necessary parties, or the secondary service by posting allowed by the Statute, after proof of diligent and ineffectual inquiries; the affidavit verifying the contents of the civil bill; the lease, or instrument under which the premises are holden, enabling the landlord to re-enter; that one-half year's rent was due at the time of the view by the justices; and if the tenant appears, and offers evidence to controvert any of the facts stated in the justices' certificate, the landlord must be prepared with evidence to support such disputed allegations.

13. By the same Statute^(p) it is enacted, that in all cases where any lands are holden by any tenant at a less rent than^(q) fifty pounds

(l) Lessee *Moore v. Barlow*, Nap. Dig. 139.

(m) *Waters v. Levinge*, 1 Crawf. & D. Circ. Ca. 26.

(n) Doe *dem.* *Showell v. Roe*, 2 Cro. M. & Rosc. 42; 5 Tyrw, 734.

(o) Doe *dem.* *Norman v. Roe*, 2 Dowl.

Pr. Ca. 428; Doe *v. Roe*, 4 Dowl. Pr. Ca. 173; Doe *dem.* *Ld. Darlington v. Cock*, 4 B. & Cress. 259.

(p) 56 Geo. III. c. 88, s. 3, Irish.

(q) 1 Geo. IV. c. 41, s. 1, Irish, increasing the amount to £50, late currency.

yearly, and that a full year's rent shall be due thereout, it shall be lawful for the landlord to proceed by civil bill against such tenants, and also such persons, if any, as shall be in *actual* possession of the premises, and also against persons having interest for valuable consideration, in cases where the deeds or instruments creating such interests shall have been duly registered; and thereupon to serve such tenant, and such other persons, with process on such civil bill, if service can be effected: and if it shall be proved to the satisfaction of the judge before whom the cause shall come, that service cannot be effected, or in case there be not any person in actual possession of the premises; to affix such process upon some notorious part of the premises, and upon the door of the parish church, if in repair, and also upon the door of the Roman Catholic chapel, if any in the parish, by which process all persons claiming to have interest in the premises, shall be required to appear on a day certain, at a quarter sessions for the division of the county in which the premises, or any part of them, shall be situated, to answer the bill of such landlord, praying to be put into possession thereof: and it shall be lawful for the assistant-barrister, upon such civil bill, and upon proof of such service, or in case of impossibility, or unreasonable difficulty of service, to be ascertained as thereinbefore provided, upon proof of such affixing of the process, and that the premises were then held by the tenant at a rate not exceeding £50 yearly, and that a sum equal to one full year's rent at such rate was due, when such proceeding by civil bill was commenced, and then remained due, after all just allowances to the tenant, to decree the landlord to be put into possession of the premises.

14. The remedy by civil bill, for the purpose of evicting a subsisting lease for non-payment of rent, is founded on the Statutes facilitating the proceeding by ejectment for non-payment of rent where a year's rent is in arrear, and, in many instances, is to be regulated by their provisions. This proceeding by civil bill can only be maintained in cases where an ejectment for non-payment of rent would lie in the superior courts, and any objection which would defeat such an ejectment will also render the civil bill unavailing; but the Statute 56 Geo. III. c. 88, has introduced several additional requisites which must be observed for the purpose of enabling the landlord to obtain relief from the inferior tribunal.

15. The civil bill process must be served upon the immediate lessee, or, according to the nature of the demise, upon the heir or personal representatives of a deceased lessee, his or their assigns, and upon every person in *actual* possession of the whole or of any part of

the premises, and also upon every intermediate tenant of the premises, though out of possession, provided he retains a reversion, and continues in receipt of rent issuing out of the lands, and upon every mortgagee, or assignee for valuable consideration; but a person, unless in *actual* possession, need not be served, where the deed or instrument under which he holds is not duly registered. The *due* registry of a deed or instrument under this Statute should, it is apprehended, be construed to mean a registry, pursuant to the Irish Statute^(r) 8 Geo. I. c. 2, made within six calendar months after the perfection of such deed or instrument: this construction is corroborated by the enactment in the latter part of the third section^(s) of the same Civil Bill Act, which provides that the tenant or other person^(t), having right *under the several Statutes* which regulate the action of ejectment for non-payment of rent to redeem any premises, the possession of which shall be given to any landlord under the provisions of the Civil Bill Act^(u) for non-payment of rent, may, at any time after execution executed, within which he or they were then by law respectively entitled, tender the rent and costs for the purpose of redeeming the premises: and that in all cases where they would have been entitled, under the existing laws, to be restored to the possession of such premises, under the decree of a Court of Equity, if deprived of possession by ejectment for non-payment of rent, they may be restored by a decree of the assistant-barrister as therein directed. By means of this reference to the Ejectment Acts, a registered mortgagee, not in possession, is entitled at any time within nine months after execution executed under a civil bill decree for non-payment of rent, upon tender of the rent and costs, and bringing^(v) a civil bill for redemption within that period, to be restored to the possession: and it is to be inferred that such persons only are required to be served with civil bill process for non-payment of rent who have interests in the premises sought to be evicted, which would entitle them to redeem within the previously existing Ejectment Acts.

16. In order to maintain a civil bill for non-payment of rent, the premises must be holden under a lease, or article^(w) *in writing*, ascertaining the rent, and such instrument need not contain any legal de-

(r) 8 Geo. I. c. 2, s. 5, Irish.

(s) 56 Geo. III. c. 88, s. 3, Irish.

(t) Such as a mortgagee by deed registered within six months after its execution.

(u) 56 Geo. III. c. 88, s. 3, Irish.

(v) And see *Blennerhassett v. Day*, 2

Ball & B. 124; Napier's Digest, 151, by M'Clelland, Baron.

(w) The expression "agreed to be demised," in the preamble of the Act, is not extended to civil bills for non-payment of rent.

mise or proviso of re-entry. There are no express words in the Civil Bill Act dispensing with the necessity of a legal demise or clause of re-entry, but it is considered that in analogy to the Irish Statute(*x*), 25 Geo. II. c. 13, s. 2, the landlord bringing such civil bill may recover possession of lands holden under any article whereby the rent is ascertained, and a full year's rent, not exceeding fifty pounds late currency, shall be due, in such and the same manner as if such article contained an actual demise, and as if a clause of re-entry had been expressly inserted therein. Unless the Civil Bill Act, so far as it relates to non-payment of rent, be construed with reference to the Statute 25 Geo. II. c. 13, it would be difficult to shew that an express clause of re-entry(*y*) was not essential to enable the landlord to evict a subsisting tenancy by a civil bill decree. Upon the same principle, it may be inferred that a landlord, upon the hearing of a civil bill for non-payment of rent, is entitled to avail himself of the benefit of the Irish(*z*) Statute, 8 Geo. I. c. 2, which allows receipt of the reserved rent out of the demised premises by the landlord, or those under whom he derives his title, for *three* years preceding, to be sufficient proof of title to the rent and reversion of the premises in the claimant.

17. A civil bill for non-payment of rent must specify(*a*) the names of the landlord and of the tenant or tenants respectively, and of all other persons(*b*) having interests in the premises under deeds or instruments duly registered; the nature of the tenancy, the description of the premises, and the baronies or parishes in which they are situated; the rent at which the premises shall then be holden; the amount due after all fair and just allowances, and when due; and the truth of the contents of the civil bill must be verified by the affidavit of the landlord, his known agent or receiver. The observations already made with respect to proceedings for desertion, on the nature of the tenancy, the description of the premises, and the affidavit to verify, are equally applicable to the civil bill for non-payment of rent. The civil bill must state the yearly rent reserved by the lease or instrument, for the purpose of shewing that it does not exceed the sum of £46 3s. 1d. present currency, being equivalent to fifty pounds late Irish money, and must also specify the amount of the rent in arrear sought to be recovered, and to what period it is alleged to be due.

18. The proofs necessary to be made on the hearing of a civil bill

(*x*) 25 Geo. II. c. 13, s. 2, Irish.

(*y*) See *ante*, as to civil bills for desertion, No. 2; Pilton, *ex parte*, 1 B. & Ald. 369.

(*z*) 8 Geo. I. c. 2, s. 1, Irish.

(*a*) 56 Geo. III. c. 88, s. 7, Irish.

(*b*) See the form in the schedule to the 58 Geo. III. c. 39, Irish.

for non-payment of rent are, that the process was served upon all proper parties, or by shewing there was unreasonable difficulty in effecting such service, when evidence will be received that the process was duly posted: for this purpose it must be proved, that diligent inquiries were made after all persons interested in the demise, whose places of residence were not known, from their relatives and at their last known place of abode, and the assistant-barrister must be satisfied, from the nature and result of such inquiries, that such persons could not be discovered, so as to enable the landlord to have them served; and if the residence of a necessary party be known, who is not regularly served, it must be proved, that every exertion was made to effect due service, and that the obstacles interposed caused such an unreasonable difficulty, as warranted the landlord in having recourse to the secondary service of posting. Where demised premises are extensive, or the tenant's property is embarrassed, although the reserved rent does not exceed £50 late currency, it is much more prudent to proceed by ejectment in the superior courts, than to resort to the inferior tribunal, in consequence of the difficulty of proving due service of the civil bill process on the requisite parties: all the persons served being defendants to the civil bill, if the landlord fail of success, the costs of the defendants who appear on the hearing may amount to a considerable sum of money.

Proof must also be made of the lease or article under which the premises are holden, reserving a pecuniary rent not exceeding £46 3s. 1d. yearly, and that rent was paid out of the premises to the plaintiff or to the person from whom the plaintiff derives; and upon a civil bill by an assignee of the lessor's interest, it is requisite to prove the assignment, or to shew that the assignee was in receipt of the reserved rent for three years preceding. If there be no appearance on the hearing of the civil bill, the affidavit(c) of the landlord or of his agent, sworn before the assistant-barrister(d), ascertaining the amount of the rent in arrear will be received as evidence of the fact, because the same effect is given by the Statute to such an affidavit, as it would have received upon an ejectment, but it will be necessary for the landlord to prove(e) his title, although there is no appearance, and the landlord's affidavit alone will not be sufficient to warrant a decree in his favour. However, it is prudent to include in the affidavit verifying the contents of the civil bill for non-payment of rent, a state-

(c) 58 Geo. III. c. 39, s. 3, Irish.

(d) Kinahan's Supplement, 95, referring to MSS. of Burton, J.; Ld. Digby

v. Mills, Irish Circ. Rep. 728.

(e) Kinahan's Supplement, 95.

ment(*f*) of the rent in arrear, and that such sum then remained due to the plaintiff as landlord of the premises, after all just and fair allowances to the tenant.

A civil bill for non-payment of rent should be tried like an action, by shewing that the process was duly served on the parties to the suit and by proving the instrument ascertaining the rent, and the defendant may shew that a person having a registered interest, or who was in actual possession of part of the premises under a valid demise, at the time of commencing the suit, was not served, or he may discharge himself wholly or partially, from the rent claimed, by establishing in evidence fair credits or fair allowances; the Statute does not require, nor does it seem necessary, that the landlord should prove any search, or examination for registered instruments affecting the premises, as it is expressly enacted(*h*), that no sum shall be allowed to the plaintiff's attorney for any such search, unless made by the directions of his client in writing. Upon a proceeding of this nature, the defendant is entitled to the benefit of any equitable defence or set-off(*i*), though such defence could not have been made available on an ejectment for non-payment of rent.

19. In case(*j*) the lessee or his assignee, or other person deriving under the lease or *article*, by which the premises shall be holden, shall suffer the decree to be executed, putting the landlord into possession of the premises, without paying the rent in arrear, with full costs, and without preferring a civil bill for relief to the assistant-barrister, or filing any bill for relief in equity within the time limited by the Statutes, after such execution executed; then and in such case, the lessee, his assignee, and all other persons deriving under such lease or article, shall be barred and foreclosed from all relief or remedy, in law or equity, other than by appeal from such civil bill decree, to be brought within the time by law limited for bringing civil bill appeals; provided always that the tenant or other person having right under the Ejectment Acts to redeem any premises, the possession of which shall at any time be given to any landlord under the provisions of this Act, for non-payment of rent, may, at any time after execution executed, within which he or they were by law respectively entitled, tender the rent and costs for the purpose of redeeming the premises; and that in all cases where he or they would have been entitled, under the existing laws, to be restored to the possession of such premises, under a decree

(*f*) See *Lockwood v. O'Brien*, Nap. Dig. 114.

(*h*) 58 Geo. III. c. 39, s. 8.

(*i*) See *Beasley v. Darcy*, 2 Sch. & Lef. 463, in the note.

(*j*) 56 Geo. III. c. 88, s. 3, Irish.

of a Court of Equity, if deprived of possession by ejectment for payment of rent, he or they might be restored to the same, civil bill decree on a civil bill preferred for that purpose, and proof made of their being respectively entitled thereto.

20. After execution executed upon a civil bill decree, a tenant or mortgagee is entitled to the same relief on exhibiting a bill in equity and lodging in Court the sum ascertained by the civil bill decree due for rent and costs, within the same periods as are limited in a similar proceeding pursuant to the Ejectment Acts. The tenant or mortgagee may, at his option, either institute a suit in equity for relief after tendering the rent and full costs, may proceed by civil bill to be restored to the possession, provided the rent and costs are tendered and such civil bill for redemption preferred *(k)* within six months by a tenant, or within nine months by a registered *(l)* mortgagee; and at the hearing of the civil bill, the assistant-barrister must ascertain the sum due for rent at the time of the hearing, as well as the costs in the suits; and after giving credit for the landlord's receipts out of the premises, and upon the immediate payment of the balance to the landlord, will decree that the evicted tenant, or the mortgagee, according to circumstances, shall be restored to the possession of the premises.

(k) Manning v. Ladley, Batty, 72, Crawf. & D. Circ. Ca. 345.
note; and see Bray v. Ld. Westmeath, 1 *(l)* Nap. Dig. 151.

CHAPTER XV.

CIVIL BILL.

OVERHOLDING.

STAT. 6 & 7 WILL. IV. C. 75.

Bill against overholding Tenants applicable to all expired Tenants, where the Rent does not exceed £46 3s. 1d. of Possession. Title must be shewn to the whole Premises comprised in the Bill of Process. Form of the Civil Bill. Title in the Hearing. Title of Defence. Title of Decree.

31. *Civil Bill by adverse Claimant.*
32. *Prescribed Limits of Jurisdiction.*
33. *Claims of both Parties must be derived under the same Lease.*
34. *Title must be shewn to all the Land comprised in the Process.*
35. *Procedure.*
36. *Form of the Civil Bill.*
37. *Abatement of the Suit.*
38. *Where Holding situate in two Counties under 56 Geo. III. c. 88.*
39. *Execution of Decree.*
40. *Appeal.*

Eviction by civil bill for desertion, or for non-payment of rent, or for effect of defeating an interest in lands, subsisting when the lease was commenced, and of rescinding the lease or contract made on the premises were then holden, while a civil bill for possession is intended merely for the recovery(a) of possession by a tenant who entered as tenants, and continue to hold without remedy by civil bill is extended by the Statute 6 & 7 Will. IV. c. 75, to disputes for possession between adverse claimants. Eviction for desertion, or for non-payment of rent, is final and conclusive, but the recovery of possession by civil bill against an adverse tenant, or adverse occupier, may be again(b) contested by the successful party. The second section of the Statute enacts, that in cases where any tenement shall have been holden by any tenant for a term not exceeding(c) fifty pounds late currency, and the value of the premises at the time of the demand shall be determined, and after demand made by the landlord or lessor, his bailiff or receiver, possession shall be restored to him; it shall be lawful for such landlord(d) to proceed by civil bill against such tenant, and such other person, if any, as shall be in

III. c. 88, Irish.
Don v. Power, 1 Cr. & D.,

British money.

IV. c. 41; £46 3s. 1d.

(d) The term "landlord," as used in the Act, has the meaning of owner of the soil, after expiration of the demise.

the *actual* possession of the premises, and thereupon to serve such tenant, and such other persons, with process on such civil bill.

22. This clause, so far as it relates to the tenant's interest, authorizes a landlord to recover possession by civil bill, on the expiration of a lease for lives(*e*) or for years, or on the expiration of a parol demise for any definite term(*f*), or on the determination of a yearly holding by notice to quit, provided the yearly rent payable by the first or immediate tenant under the demise, did not exceed £50 of the late currency, and provided the other statutable requisites are observed. If a lessee assign his interest, or the demised premises, on the lessee's death, pass to his heir or executor, the lessor may, on the determination of the demise, recover possession by civil bill, though no rent was paid subsequently to the assignment, or to the death of the lessee.

23. The Statute requires that a demand of possession shall be made by the landlord(*g*), his bailiff, or receiver, after the determination of the demise, and prior to service of civil bill process: this demand should be made as soon after the expiration of the tenancy as circumstances will permit, for if the occupier be suffered to till his farm before any demand made, and without any intimation that the landlord requires the possession, a renewal of the tenancy may be presumed. Upon the hearing of a civil bill against an overholding tenant, the demand of possession must be clearly proved by explicit evidence, and if the demand be made by a bailiff, his name must be inserted in the civil bill, pursuant to the form annexed to the Statute(*h*), and if a blank be left for the bailiff's name(*i*), or be filled up with a wrong name, the process will be defective, and the civil bill dismissed. It is not requisite that possession shall be demanded from undertenants(*j*) in the occupation of the premises, as a demand made on the immediate tenant or lessee by the landlord or his bailiff, is deemed sufficient, being, in this respect, analogous to a notice to quit, which need(*k*) only be served on the immediate tenant, for the purpose of putting an end to a yearly holding: the civil bill process, however, must be served on all persons in *actual* possession(*l*), so as to make them parties to the decree which is to be executed against them. The demand of possession may be

(*e*) O'Reilly v. O'Reilly, Irish Circ. Rep. 305; 2 Cr. & D., Circ. Ca. 134.

(*f*) Nap. Dig. 148, by Joy, C. Baron.

(*g*) Bernard v. Rigney, 1 Cr. & D., Circ. Ca. 571.

(*h*) 58 Geo. III. c. 39, Sched. C.

(*i*) Duffy v. Callan, Nap. Dig. 143, by Bushe, C. J.

(*j*) Ware v. Bailey, upon appeal, by

Burton, J.; Kinahan's Digest, Supplement, 108.

(*k*) Roe v. Wiggs, 2 New Rep. 330; Pleasant dem. Hayton v. Benson, 14 East, 234.

(*l*) 56 Geo. III. c. 88, s. 2, Irish; and see Doe dem. Ld. Darlington v. Cock, 4 B. & Cress. 259.

made on the immediate tenant personally at any place, or at his dwelling-house on the demised premises(*m*) from his wife, child, or servant, and in case the tenant does not reside on the land, or cannot be readily found, the landlord, or his bailiff, may go on the premises and make the demand on any person he finds in possession.

24. The *prima facie* effect of a notice to quit is to allow the tenant the whole of the day for quitting, on which he is required to give up possession, and it has been ruled, that a demise(*n*) in ejectment cannot be sustained, if laid before the following day: an opinion, however, generally prevails amongst land-owners, that the tenant should quit at or before sun-set on the last day of the demise, and that a demand of possession should be made on the same day. A tenant being served with notice to quit on the 29th of September, civil bill process was served, and possession demanded on the same day: Pennefather, Baron, on appeal(*o*), said, "he did not think it right in a proceeding by civil bill to adhere to the extremely technical rule adopted by the superior courts in respect to ejectments;" but in a similar case(*p*), Greene, J., held, on appeal, that the tenant was entitled to the possession until the last moment of the day on which the notice to quit expired, and that the demand was prematurely made. It is more prudent to make the demand on some day after the determination of the demise, and after the day specified in a notice to quit for giving up possession, as it may be made on any day within a reasonable time after the expiration of the holding, and before service of the civil bill process.

25. On the expiration of a lease reserving a rent not exceeding £50 in the current currency, all persons in the actual possession of any part of the premises sought to be recovered, must be made defendants in the civil bill, and must be served with process: and if an undertenant, or other person in actual possession of any part of the premises be not duly served, any party(*q*) is competent, on the hearing of the civil bill, to take advantage of such omission, and on proof of the fact, the whole proceeding will be defeated. The entire of the premises comprised in the expired lease, should be included in the civil bill; but if an undertenant, who occupies only part of the premises, overhold such part, and the re-

(*m*) Longan v. Walsh, 1 Irish Circ. Rep. 32; Robb v. Cullen, 1 Cr. & D., Circ. Ca. 279.

(*n*) Jack dem. Lynas v. Hampton, 2 Webb & S. 448; 3 Irish Law Rep. 344.

(*o*) Anon. Irish Circ. Rep. 428, by Pennefather, B.; Graily v. Conry, Nap. Dig. 142, by Vandeleur, and Burton, J.;

Kinahan's Supplement to Civil Bill Dig. 94; Tunstead v. Kinsella, 1 Cr. & D., Circ. Ca. 210.

(*p*) Griffith v. Boland, Irish Circ. Rep. 471.

(*q*) Corboy v. Corboy, 1 Cr. & D., Circ. Ca. 572; Tabany v. Booth, Irish Circ. Rep. 663.

sidue is given up to the landlord, a civil bill may be framed for recovery of the part so detained, as being comprised in a less or greater portion of land, and on proof of the facts such specific recovery may be recovered.

26. It is only requisite that the immediate tenant, and all persons in actual possession, shall be served with the process, and persons claiming mere derivative or intermediate interests, who are not in possession, need not be served(*r*), as by coupling the enactment and the schedule together, it seems that the legislature intended to make a distinction between the persons in possession, who are to be served, and the persons interested, and out of possession, who are at liberty to appear at the hearing of the civil bill. Where persons not in possession were made defendants to a civil bill, it was ruled on appeal(*s*), that non-service of such parties was no ground for dismissing the process; but where a civil bill varied from the prescribed form, by leaving out the words "that all persons claiming to have any interest in the premises sought to be recovered, are required to appear," Pennefather, Baron, held the omission fatal, and that persons might be misled by the deviation from the common form.

27. A civil bill against an overholding tenant, must specify the names of the landlord, and of the tenant or tenants respectively, and of such other persons as shall be found in *actual* possession of the premises sought to be recovered, and all such persons in possession(*t*) must be made defendants in the suit. The nature of the tenancy, the description of the premises, and the baronies or parishes in which they are situated, and the rent at which they had last been holden, must also be set forth: the nature of the tenancy stated in the process must be consistent(*u*) with the proofs in the cause, and the description of the lands in the civil bill must correspond to the parcels comprised in the lease or notice to quit; but a discrepancy between the statement of the yearly rent in the civil bill, and the yearly rent at which the premises were last holden, does not vitiate the proceeding, as the yearly rent is only stated for the purpose of bringing the case within the jurisdiction. The fact of the nature of the tenancy, and the means by which the same shall have been determined, must also be stated. Where the civil bill

(*r*) *Ansborough v. Ld. Lucan*, Irish Circ. Rep. 473.

(*s*) *Nap. Dig.* 147.

(*t*) See the form annexed to Stat. 58 Geo. III. c. 39.

(*u*) *Ham v. Mears*, 1 Cr. & D., Circ.

Ca. 341.

(*v*) *Ld. Kingston's case*, Ir Rep. 507.

(*w*) *Capbie v. White*, 2 Cr. & D. Ca. 432; *Nap. Dig.* 114, *ton, J.*; but see *Longf. Civil E*

that the tenancy(*x*) determined on the 1st day of May, or 1st day of November last past, by virtue of a notice to quit, the allegation was considered sufficiently precise: upon a case reserved for the opinion of the judges, it appeared that a civil bill for overholding stated(*y*), that the defendant held as tenant to the plaintiff, under a demise thereof made *from year to year*, and that the words “the —— day of ——, in the year ——,” which are inserted in the prescribed form(*z*), were struck out, it was ruled that such deviation did not invalidate the proceeding.

The schedule annexed to the Statute does not contain any form of civil bill *strictly* applicable to a yearly holding, and it is often difficult to ascertain at what period a yearly tenancy commenced. Where the commencement of the holding cannot be discovered, and the notice to quit is framed in the alternative, allowing the tenant a whole year(*a*) for giving up possession, the days of the date and determination of the demise should be omitted, and the demise may be stated as a holding from year to year, which was determined by a notice to quit; but if the tenancy is known to have begun at Lady-day, the date of the demise may be filled up with the 25th day of March in any year while the holding subsisted, preceding the expiration of the time specified in the notice to quit. Where a civil bill alleged that the defendant held as tenant *at will*, or *from year to year*, which demise determined on the 1st of November, by virtue of a notice to quit, it was ruled(*b*) that the holding must be considered as a yearly tenancy, and that the statement was sufficient. The demand and refusal of possession must also be stated, and an affidavit must be made by the landlord, his agent, or receiver, verifying the contents of the civil bill.

28. The proofs required by the Statute(*c*) to be made on the landlord's behalf are: first, service of the process on the immediate tenant, and on all other persons in *actual* possession of the premises, and in case such service could not be effected, or in case of there not being any person in *actual* possession of the premises, upon proving the facts to the satisfaction of the judge, it may be shewn that the process was duly posted as required by the Act; secondly, that the tenant against whom the proceeding is taken, held the premises at a rent not exceeding fifty pounds late currency, and that his interest had determined(*d*), and in cases where notice to quit is necessary, that such notice was

(*x*) *Garrigan v. Sturgeon*, 1 Cr. & D., Circ. Rep. 7.

(*y*) *Fox v. M'Tiernan*, Nap. Dig. 143 and 148; Longf. Civil Bills, 211.

(*z*) 58 Geo. III. c. 39, Sched. B. & C.

(*a*) *Ld. Erne v. Wiggins*, Stewart's

Comm. 34.

(*b*) Nap. Dig. 142, by Pennefather, B.

(*c*) 56 Geo. III. c. 88, s. 2, Irish.

(*d*) *O'Reilly v. O'Reilly*, Irish Circ. Rep. 305; 2 Cr. & D., Circ. Rep. 134.

duly served, and that the time for giving up possession had elapsed before the suit was commenced; and thirdly, that possession was demanded by the landlord or his bailiff, and was refused before the process was served. The evidence requisite to establish the several matters necessary to be proved, is the same as must be given on the trial of ejectments brought in the superior courts under similar circumstances.

29. By the express provisions of the Statute(*e*), 56 Geo. III. c. 88, s. 9, every defendant appearing on the hearing of a civil bill in any case under that Act, is entitled to every defence which he might have, either in law or in equity: a defendant to a civil bill for overholding, in addition to any case which would be considered a sufficient defence, upon the trial of an ejectment, may avail himself of many equitable grounds of defence which could not be entertained by a superior court of law, and may compel the plaintiff to disclose, upon oath, any facts, within his knowledge, that may contribute to resist or reduce the claim. The tenant may shew he is entitled to an equitable(*f*) agreement in writing, or accepted proposal for a lease, or to the benefit of a covenant, or contract for renewal, or that the landlord had agreed in writing to grant a new lease of the premises, or to sell his interest in them to the tenant; or any other case may be established which would entitle the tenant to obtain an injunction from a Court of Equity, upon a bill filed for that purpose. Part-performance of a verbal contract for a demise, is also a common defence, and has been too much encouraged. It is to be regretted that a case of this description was ever allowed before any inferior tribunal; but it is now settled that such a defence(*g*) ought only to prevail where the judge is induced to think that a Court of Equity would carry the agreement into execution; and in order to take a mere verbal promise of a lease out of the Statute of Frauds, some new or collateral fact must be proved(*h*), such as a change of possession, or change of rent, or other part-performance utterly inconsistent with a yearly tenancy.

30. Where a tenant brings an ejectment on the title in the superior courts, with a view of impeaching the validity of an eviction either for desertion, or for non-payment of rent, after proof made of an unexpired lease, it becomes difficult for the landlord, after the lapse of a very few

(*e*) 56 Geo. III. c. 88, s. 9, Irish.

(*f*) *Dermody v. Busby*, 2 Crawf. & Dix, Cir. Ca. 77.

(*g*) *Hayden v. Cashin*, Irish Circ. Rep. 589, by Burton, J.; *Moorehead v. Woods*, Nap. Dig. 118; *Lord Westmeath v. Clarke*, 1 Cr. & D., Circ. Ca.

348; *Gawley v. Grier*, Irish Circ. Rep. 100.

(*h*) *Griffith v. Boland*, Irish Circ. Rep. 666; *Hayden v. Cashin*, Irish Circ. Rep. 539; *Dillon v. Daniel*, 1 Cr. & D., Circ. Ca. 25.

years, to establish all the facts necessary to constitute a complete eviction: to obviate this inconvenience, a clause was introduced into the Statute⁽ⁱ⁾ that in all cases (*except* where the proceeding is grounded on non-payment of rent) the assistant-barrister shall sign two copies of every decree, and also a memorial thereof, for the purpose of registry, and that the affixing of his signature to one of such copies, shall be witnessed by some person present at the time of such signature: and that it shall be lawful for the landlord, if he thinks proper, at any time between the termination^(j) of the assizes for the county then next ensuing, and the commencement of the assizes thereafter next following, to register one copy of such decree in the office for the registering of deeds and wills in Ireland, by lodging a memorial, and proving the perfection thereof: and that after the registry of such decree, it shall have the further effect of a conveyance to the landlord of any interest which the tenant, or any person claiming under him, might have to the premises, freed and discharged from all leases, contracts, mortgages, debts, charges, or incumbrances, which such tenant, or any person claiming under him, might have charged, made, or created thereon.

The manifest object of this provision was to make the memorial of registry of a civil bill decree equivalent to a surrender or re-conveyance of all the interest of an evicted tenant in the premises, discharged of any incumbrances created by him, and to afford the landlord an easy mode of proving the civil bill decree: the framers of the Act have, however, excepted decrees for non-payment of rent out of the operation of the registry clause, and have inadvertently extended the privilege of registry to decrees against overholding tenants, a subject to which the principle of registry and re-conveyance is inapplicable.

31. By the Irish Statute^(k), 6 & 7 Will. IV. c. 75, it is enacted, that the respective assistant-barristers shall hear and determine, within their respective jurisdictions, all disputes and differences respecting the possession of any lands, tenements, or hereditaments, held under any grant, lease, or other instrument, for any term or interest, the duration or extent whereof, when originally granted or created, did not exceed three lives, without any provision for renewal, or a term of sixty-one years, determinable on three lives, or a term of sixty-one years absolute; and the yearly rent reserved, or payable under such grant, lease, or other instrument, shall not exceed £20, and in respect of which no

(i) 56 Geo. III. c. 88, s. 12, Irish.

(j) After the time allowed for appeal-

ing has expired.

(k) 6 & 7 Will. IV. c. 75, s. 2, Irish.

fine, exceeding £50, was paid on the granting or execution of such lease, or other instrument : and every person claiming such possession may proceed, by civil bill in the court for the county, division, or district wherein such lands, tenements, or hereditaments, or any part thereof, shall be situate, for recovery of such possession : and every such civil bill shall specify the name and residence of the claimant, and the description of the property sought to be recovered, and the barony or parish in which the same is situate : and shall require the persons in possession of, or claiming any interest in such lands, &c. to appear before the assistant-barrister on a day, and at a place therein mentioned, to answer such civil bill.

32. The Act of the 56 Geo. III. c. 88, relates exclusively to cases between landlord and tenant, and questions of title can only be investigated under it, so far as may become necessary^(l) for carrying into effect the objects of the Statute ; but the Act of the 6 & 7 Will. IV. c. 75, confers jurisdiction for the trial of differences respecting the possession of land between adverse claimants, necessarily involving proof of title : the authority of the inferior courts, however, is confined to proceedings for the recovery of possession of tenements comprised in leases, or agreements for leases, originally granted for a term not exceeding three lives, without any provision for renewal ; or for a term of sixty-one years, determinable on three lives, or for an absolute term of sixty-one years, where the reserved rent does not exceed £20, and on the execution of which no fine was paid exceeding £50 : leases in the alternative^(m) for two lives, or thirty-one years, do not come within the provisions of the Act.

33. The title of the claimant must not only be derived under a demise for a term not exceeding the prescribed limits, but the interest or possession⁽ⁿ⁾ of the defendant must be derived from the same source, and not by any title paramount^(o). It is not essential that either^(p) party should hold under an instrument in writing, and a tenant by lease for three lives, at a yearly rent of £20, who put a care-taker^(q)

(l) *O'Reilly v. O'Reilly*, Irish Circ. Rep. 305; 2 Cr. & D., C. C. 134.

(m) *M'Cann v. M'Cann*, 1 Cr. & D., C. C. 426; *Cryan v. Cryan*, 1 Cr. & D., C. C. 495; *Dolan v. O'Brien*, Irish Cir. Rep. 79.

(n) *Rorke v. Renahan*, 1 Cr. & D., C. C. 39; *Montgomery v. Joyce*, 1 Cr. & D., C. C. 422; and see the note to *Travers v. Hassett*, Irish Circ. Rep. 229.

(o) *Ahern v. Heffernan*, 1 Legal Rep. 151.

(p) *Charters v. Gilroy*, *Jebb's Reserved Cases*, 319; 1 *Crawf. & D.*, C. C. 454; *Young v. M'Nally*, 2 Cr. & D., C. C. 34; *Young's case*, Irish Circ. Rep. 58.

(q) *Travers v. Hassett*, Irish Circ. Rep. 228.

possession, was held entitled to turn him out by a civil bill founded on this Statute.

1. A decree cannot be made for part of the premises(*r*) claimed by a civil bill; and where a specified quantity of land in possession of persons is sought to be recovered, there cannot be a decree as to part held by one, and a dismiss as to the part held by the other; a proceeding being considered inconsistent with the provisions of the Civil Bill Acts, and with the prescribed forms: where a civil bill was brought for three acres of land, and the claimant proved a clear title to part, it was ruled on appeal by Bushe, C. J., that the suit could not be sustained, as the plaintiff had failed in making out a title to the whole of the premises claimed by his process.

2. The civil bill must specify the name and residence of the claimant, the description of the property sought to be recovered, and the townland(*s*) or parish in which it is situated, and must require the person in possession of, or claiming any interest in such tenements, to appear on the hearing of the cause: the process must be served on every person in actual possession of the tenements specified in, and claimed by the civil bill, and must also(*t*) be served on such other persons as are interested in the whole, or any part of the premises.

3. On the hearing of any civil bill for recovery of possession, each party may appeal to the oath(*u*) of his adversary on the subject of the cause of action, by giving notice of such intention five days previous to the commencement of the sessions, but the assistant-barrister has a discretionary power to dispense with such appeal, if he thinks it expedient to do so.

4. A civil bill under these Statutes(*v*) does not contain any feigned issue, and where it is necessary, or convenient, that several persons, having distinct interests in the same land, should join as co-plaintiffs, as mortgagor and mortgagee, heir at law and devisee, trustee and cestui *que trust*, the mode adopted for the purpose is, by entitling(*w*) the bill in the names of such several persons, as co-plaintiffs, and by requiring the defendant to be tenant to them, or to some or one of them; stating that the plaintiffs, or some, or one of them, are, or is entitled to recover the possession. It is injudicious to state in a civil bill, the right in which a claimant seeks to recover possession, such as ex-

Corboy v. Corboy, 1 Cr. & D., 172; Lynch v. Lynch, Irish Circ. 62.

3ell v. M'Cartney, 2 Cr. & D., 173; Irish Circ. Rep. 572.

6 & 7 Will. IV. c. 75, s. 3, Irish.

(*u*) 6 & 7 Will. IV. c. 75, s. 36, Ir.

(*v*) 56 Geo. III. c. 88, Irish; 6 & 7 Will. IV. c. 75, Irish.

(*w*) Goold v. Murphy, Stew. Comm. 9; Keely v. Murphy, 2 Hogan, 234.

cutor, or assignee of a bankrupt or insolvent, for such right must be made the subject of proof on the hearing, and a misdescription would be injurious.

No amendment is suffered to be made in a civil bill, but by the 6 & 7 Will. IV. c. 75, s. 35, it is declared(*x*), that all errors or mistakes in civil bills, which have not a tendency to mislead the opposite party, shall be deemed merely verbal or technical, and that no verbal or technical error shall invalidate the proceeding, and the assistant barrister is authorized to determine what constitutes a verbal or technical error or mistake. However, the decision of the assistant-barrister on this point(*y*) is subject to be revised on appeal.

37. The death of one of several(*z*) defendants in a civil bill for recovery of possession before hearing, or after appeal(*a*) lodged, causes an abatement of the suit, but the death of a joint-plaintiff has no such effect, as the right of action survives, and the cause may proceed. Where a civil bill by a *feme sole* was dismissed, and she married after appeal lodged, her marriage was held an abatement(*b*), as her husband was not a party. If a sole plaintiff, or sole defendant, appeal against a civil bill decree, and either party(*c*) die before the hearing of the appeal, the suit abates.

38. Where a civil bill is brought for recovery of possession of any tenement situate in two or more counties, and a decree is obtained in either county(*d*), the sheriffs of the respective counties are required to execute such decree, upon delivery of a copy of the decree, with a warrant for its execution, signed by the assistant-barrister of the county in which it was pronounced.

39. By the Irish Statute(*e*), 7 Will. IV. & 1 Vic. c. 43, all civil bill decrees for delivery of possession were required to be executed by the sheriff, or his deputy *in person*, but by the Statute(*f*), 5 & 6 Vict. c. 33, after reciting, that doubts had arisen(*g*), whether sheriffs in Ireland had power to appoint any deputy, other than their under-sheriffs, for the purpose of executing civil bill decrees for the possession of land, it is enacted, that it shall be lawful for all sheriffs in Ireland, when required to do so by the plaintiff in any civil bill ejectment decree, by

(*x*) 6 & 7 Will. IV. c. 75, s. 35, Irish.

(*y*) *Ham v. Mears*, 1 Cr. & D., Circ. Ca. 344, by Bushe, C. J.

(*z*) *O'Reilly v. Smith*, 1 Cr. & D., Abr. Notes, 270.

(*a*) *Crehan v. Martin*, 1 Irish Circ. Rep. 339; but see *Nolan v. Fox*, 1 Cr. & D., Circ. Ca. 549.

(*b*) *O'Brien v. Bourke*, Irish Circ.

Rep. 27.

(*c*) *Anon.* 1 Cr. & D., Circ. Ca. 268.

(*d*) 56 Geo. III. c. 88, s. 11, Irish.

(*e*) 7 Will. IV. & 1 Vict. c. 43, s. 4, Irish.

(*f*) 5 & 6 Vict. c. 33.

(*g*) *Brennan v. Gray*, Irish Circ. Rep. 90.

nselves or their under-sheriffs, acting in their names, and on their
alf, by endorsement on such civil bill decree, to appoint any person
ersons they think fit as their deputies, and *at the peril of such she-*
s, to execute decrees for delivering possession of land, and for the
s of such decrees.

40. Every party, plaintiff or defendant, appearing on the trial of a
l bill for recovery of possession, is entitled to appeal against any
ree made against him to the next going judges of assize for the
nty in which the lands are situated, on complying with the terms
uired by the Statutes : the enactments conferring the right of appeal
extremely complicated, and the difficulties were increased by con-
lictory decisions. The judges of the superior courts of law, after
sidering this subject(*h*), resolved, that according to the true con-
ction of the twenty-ninth and thirtieth sections of the 30 Geo. III.
5, it is the duty of the assistant-barrister, before receiving an ap-
l, to see that the party appealing has complied with the requisitions
he Statute in that behalf, and that, pursuant to the thirtieth and
ty-first sections of the same Act, it is the duty of the sheriff, in like
ner, to see that the party appealing has complied with such requi-
ns : and accordingly, the judges have determined, that in future,
he hearing of civil bill appeals, they will consider the reception of
ppeal by the assistant-barrister, recorder, or chairman of Kilmain-
, and the entry thereof in the book of the clerk of the peace, or
r proper officer, and the certificate of appeal of the sheriff, as con-
ive evidence of the due performance by the party appealing, of the
ral matters, which it is the duty of such assistant-barrister, recor-
or chairman, or sheriff, to see have been performed by him as such
ellant.

The assistant-barristers afford every facility to the remedy by ap-
, and, in consequence of the preceding resolution, it becomes unne-
ary to enter upon any discussion of the subject.

(*h*) 16th June, 1843.

CHAPTER XVI.

MESNE PROFITS.

1. *Origin of Trespass for Mesne Profits.*
2. *Remedy by Statute, 1 Geo. IV. c. 87.*
3. *In whose Name Action may be brought.*
4. *Lies against Person in Receipt of the Rents of the Premises.*
5. *Where Undertenant overholds adversely to his Lessor.*
6. *Person occupying as Agent may be treated as Trespasser.*
7. *Judgement in Ejectment conclusive Evidence of Title.*
8. *Plaintiff's Proofs on the Trial.*
9. *Judgement in Ejectment only proves Right to Mesne Profits from the Service of the Ejectment.*
10. *Profits antecedent to Day of the Demise may be recovered.*
11. *Judgement, Evidence against Parties and Privies only, and not against Strangers.*
12. *Plaintiff's Entry, how to be proved.*
13. *Where Party, by waiving Action for Mesne Profits, may recover double Value.*
14. *Recovery of Mesne Profits against Executors.*
15. *Set-off against Mesne Profits allowed in Equity.*
16. *Bankruptcy or Insolvency no Defence to the Action.*
17. *What Damages are recoverable.*
18. *Real Defendant, though no Party, ordered to pay the Costs.*
19. *Pleadings and Evidence.*
20. *Recoverable by Civil Bill to the amount of Ten Pounds.*
21. *Mesne Profits, after Eviction for Non-payment of Rent.*

1. THE owner of land, who has been wrongfully deprived of its possession, may, after his re-entry, recover in an action(*a*) of trespass, all the intermediate profits derived out of the premises from the time of the ouster, as the law *by relation* refers such re-entry to the original right. This principle is the foundation of the action of trespass for mesne profits, because after judgement and execution in ejectment, the lessor of the plaintiff is considered in law to have been *in* the actual possession from the day of the demise laid in the ejectment, and may recover the mesne profits, by way of damages, in an action of trespass against the wrongful occupant of the lands from that day. By the old law and practice, the plaintiff in ejectment recovered nothing but damages, the measure of which was the mesne profits: and when it was established that the term(*b*) should be recovered, the ejectment, assuming the form of a real action, was converted into a proceeding *in rem*, and nominal damages were awarded to the claimant: an action

(*a*) *Brunker v. Cook*, 11 Mod. 121-128; *Monckton v. Pashley*, 2 Ld. Raym. 977; *Aslin v. Parkin*, 2 Burr. 667; *Co. Litt.* 257, A.; *Bull. N. P.* 86; and see the reporter's note to *Butcher v. But-*

cher, 1 Mann. & Ry. 221.

(*b*) *Duppa v. Mayo*, 1 Saund. 277, A. note 4; *Hodgson v. Gascoigne*, 5 B. & Ald. 92, by Ld. Tenterden.

respass was then introduced as the means of obtaining the mesne profits, and was grafted on the fictitious proceeding by ejectment, and substituted for the old common law ejectment.

2. Landlords are now enabled, upon the trial of an ejectment, by Statute(c), 1 Geo. IV. c. 87, to recover mesne profits, from the time of the determination of the tenancy to the time of giving the verdict, but the remedy does not extend to the recovery of mesne profits, from the time of obtaining the verdict to the execution of the writ of possession, and is seldom adopted in Irish practice: upon the trial of an ejectment, the landlord may recover for mesne profits(d) down to the day of trial, without proof of any notice of trial.

3. This action may be brought in the name of a sole lessor of the plaintiff in ejectment, or in the name of the feigned lessee: the action in the name of the feigned lessee lies either after judgement by default, or after verdict(e), the right of the plaintiff in the latter case being fixed and determined, and in the former being confessed, but security costs may be required in an action at the suit of the feigned lessee, and the account of the mesne profits at his suit cannot be carried far back than the day of the demise laid in the ejectment. If there be several separate demises in ejectment, in the names of several different persons, an action for the mesne profits may be instituted in the names(f) of all the lessors of the plaintiff, because the judgement in ejectment is perfectly consistent with a title in the several lessors of the plaintiff, tenants in common: and where a general judgement in ejectment is entered, an action for the mesne profits lies at the suit of the lessor or of all the lessors in any one of the demises, but in order to entitle such a plaintiff to recover *the whole* of the mesne profits, it should be shewn that the possession of the premises was delivered to him or to his agent, or that he had a right to the premises, to the exclusion of any of the other persons of the plaintiff. A tenant in common who recovers in ejectment, may support an action for the mesne profits(g) against a tenant in possession, or against his companion who has received the rents and profits of such undivided part.

4. It has been laid down that the recovery in ejectment only proves title, and in order to support an action for the mesne profits, that actual(h) occupation by the defendant must be shewn: however it has

(c) 1 Geo. IV. c. 87, Eng. & Irish.
(d) Doe *dem.* Thompson *v.* Hodgson, 10 D. & Ell. 135; 4 P. & Dav. 142.
(e) Aslin *v.* Parkin, 2 Burr. 665; 2 Ken. 378; Barnes, 472, S. C.
(f) Chamier *v.* Lingon, 2 Chitty's

Rep. 410; 5 M. & Selw. 64, S. C.
(g) Goodtitle *v.* Tombs, 3 Wils. 118; Cutting *v.* Derby, 2 W. Bla. 1075.
(h) Doe *dem.* James *v.* Staunton, 2 B. & Ald. 373, by Bayley, J.; 1 Chitty's

always been considered by Irish courts of justice, that this action lies against(*i*) a tenant who has been served with the ejectment, for the overholding of his undertenants, when such intermediate tenant has recognized the acts of those holding under him, or has received, or is entitled to recover from them the rents of the premises during the time possession was wrongfully detained, although such intermediate tenant had not taken defence to the ejectment: a lessee, who puts(*j*) another person in as tenant, and encourages him to remain after the title has determined, is a trespasser by his tenant: it is also quite consistent with the equitable principles on which the action of ejectment and the supplementary remedy for mesne profits are founded, to compel such intermediate tenant, not only to refund(*k*) the rents which he received, but to pay the costs incurred in recovering possession of the premises. If a different doctrine were to prevail, the action for mesne profits would be rendered almost nugatory, as defences are often taken by insolvent occupiers, and it is difficult to establish by strict evidence any connexion between such occupiers and the immediate lessee of the premises.

It was held in Liford's case(*l*), that where A disseises B, and then A makes a feoffment in fee to C, who takes the profits, and then B re-enters, in an action of trespass, B shall recover from A all the mesne profits(*m*) which were received by C. In an action for mesne profits against Philip Donovan, it appeared that he and William Donovan were served with an ejectment on the title, and William Donovan having taken defence, a verdict and judgement were obtained against him: William Donovan being afterwards discharged as an insolvent debtor, it was proved(*n*) that Philip Donovan had been in possession or in receipt of the rents and profits from the day of the demise in ejectment until the writ of *habere* was executed, and it was ruled, that Philip was not only liable for the mesne profits, but for the costs(*o*) of the ejectment incurred by reason of the defence in the name of William Donovan.

Rep. 118, S. C.; Burne v. Richardson, 4 Taunt. 720; Adams, 383.

(*i*) Pry v. Donovan, 2 Huds. & Br. 184; 1 Ch. Plead. 224; and see *Ld. Listowell v. Greene*, 3 Irish Law Rep. 205.

(*j*) Doe v. Harlow, 12 Ad. & Ell. 40.

(*k*) Doe dem. Masters v. Gray, 10 B. & Cress. 615; and see *Caruth v. Ld. Northland, Hayes*, 544.

(*l*) Liford's case, 11 Rep. 51, A.; *Stamp v. Clinton*, 1 Rolle's Rep. 95-101, S. C.

(*m*) *Rosewell v. Prior*, 1 *Ld. Raym.* 715, citing Liford's case; *Holcombe v. Rawlyns, Moor*, 461; *Cro. Eliz.* 540; *Owen*, 111; 2 *Ro. Abr.* 554, *Trespass*, T. pl. 5, 6, 7, and 8; *Com. Dig. Trespass* (B. 2); *Lord Salisbury's case*, Year Book, 19 Hen. VI. fo. 28, B.; *Bro. Abr. Trespass*, pl. 127.

(*n*) Pry v. Donovan, 2 Huds. & Br. 184; Doe v. Harlow, 12 Ad. & Ell. 40.

(*o*) *Love v. Reilly*, 2 Huds. & Br. 185, note.

tion for mesne profits against an intermediate tenant in receipt and profits after judgement in ejectment, of which it did not appear to have had any notice, evidence being given(*p*) that such immediate tenant had promised to pay the rent and costs, it was ruled that his defence amounted to an admission that he himself was a trespasser.

When the possession of demised premises is withheld from the landlord, after the expiration of a lease for a term of years, by an agent(*q*), against the will of the immediate lessee, and the permissive holding has not been recognized by the middleman as his tenant after the expiration of the term, an action will not lie for mesne profits against the immediate lessee, but may be sustained by the head landlord against the undertenant for the time during which he overtook possession: the intermediate tenant is bound to restore the premises at the expiration of his term, and may be rendered answerable in an action for wrongful withholding of possession.

A person who was in possession of premises recovered in ejectment at any time after the day of the demise, and prior to the execution of the writ of possession, cannot(*s*) protect himself against an action for mesne profits, by shewing he was agent, or acted under the authority of another, because one person cannot license another to do a wrongful act, but in order to subject a person to this action, who was a party to, and is not concluded by the judgement in ejectment, his occupation(*t*) must be referrible to the character of tenant, and not merely to that of a servant.

The judgement in ejectment affords conclusive evidence(*u*) of the title of the lessor of the plaintiff, and of his right to the possession at the time of the demise laid in ejectment, in an action for the mesne profits against a person who was served with, or had due notice of the ejectment, and whether such action is brought in the name of the nominal plaintiff, or of the real claimant, or whether the judgement in ejectment was obtained on verdict, or by default: however, the Exchequer, in *v. Huddart*, considered the decided cases on the subject not en-

under *v. Britts*, 3 Camp. N. P.

bs v. Richardson, 1 P. & Dav. Ad. & Ell. 849, S. C.; and see *v. Christy*, 12 Mees. & W. 316,

irdlestone v. Porter, Woodf. L. 1, in the note.

oe dem. James v. Staunton, 1 Rep. 11812-3, by Bayley, J.; 2

B. & Ald. 373, S. C.

(*t*) *Aslin v. Parkin*, 2 Burr. 665; 2 Ld. Ken. 378, S. C.; *Adams*, 388; 2 Starkie's Evidence, 313; 2 Selw. N. P. 774; *Peake's Evidence*, 349; and see the reporter's note to *Doe dem. Tatham v. Wright*, 6 Nev. & M. 144.

(*u*) *Doe v. Huddart*, 2 Cro. M. & Rosc. 316; 5 Tyrw. 846; 4 Dowl. Pr. Ca. 437, S. C.

titled to much weight, because they might be explained on the supposition, that the circumstances were such as would make it immaterial for the judges to distinguish between what was very cogent and what was conclusive evidence in the cause. Two sets of demises being laid in an ejectment on the 18th of June, 1831, and on the 1st of May, 1834, respectively, judgement was obtained by default, and execution executed : an action was then brought in the name of the feigned lessee for mesne profits from the 18th of June, 1831, and the defendant pleaded that the premises in the declaration mentioned, were not the premises of the plaintiff, and on the trial(*v*) proposed to shew that the title of the lessor of the plaintiff in the ejectment did not accrue prior to the time of the demise in 1834, but the judgement in ejectment being deemed conclusive, and the proposed evidence being rejected, the verdict was set aside, on the ground that the judgement in ejectment, although of some weight, was not conclusive, and consequently, as the pleadings were framed, the defendant should not have been prevented from going into the proposed evidence, because the plaintiff, instead of replying(*w*) the estoppel arising from the judgement in ejectment, had joined issue upon the alleged title. The new rules of pleading which are in force in England, not being extended to Ireland, the plea of “not guilty,” is a general denial of the cause of action, and as the plaintiff has no opportunity of replying(*x*) the estoppel, the judgement in ejectment, and possession under it, still continue to afford conclusive evidence of the plaintiff’s title, and a plea(*y*) denying that the plaintiff was possessed of the premises, cannot be supported.

8. This action may be brought either against the defendant in ejectment, or against a person in the actual occupation, or in the receipt of the rents and profits of the premises, during any period intervening between the day of the demise and the execution of the writ of *habere* ; and the plaintiff(*z*) must prove, on the trial, an attested and compared copy of the judgement in ejectment, and the writ of possession and return ; and in case the defendant in the action did not take defence to the ejectment, then the defendant’s possession should be proved, either by shewing that he occupied or received the rents of the premises, or recognized the occupier as his tenant. In order to shew that a party,

(*v*) Doe v. Huddart, 2 Cro. M. & Rosc. 316 ; 5 Tyrw. 846 ; 4 Dowl. Pr. Ca. 437, S. C.

(*w*) See the reporter’s note to Doe dem. Tatham v. Wright, 6 Nev. & M. 144 ; Doe v. Wright, 10 Ad. & Ell. 763 ; 2 P. & Dav. 672, S. C.

(*x*) Armstrong v. Norton, 2 Irish Law Rep. 96.

(*y*) Jack v. Swift, 2 Irish Law Rep. 7.

(*z*) Aslin v. Parkin, 2 Ld. Ken. 378 ; 2 Burr. 665 ; Bull. N. P. 87 ; Doe v. Huddart, 5 Tyrw. 846 ; 2 Cro. M. & Rosc. 316 ; 4 Dowl. Pr. Ca. 437, S. C.

who did not take defence, was served with the ejectment, an attested and compared copy of the affidavit of service(*a*) is sufficient evidence of the fact against the persons stated in it to have been served; and an unstamped instrument amounting to an agreement by the defendant, is admissible evidence for the collateral purpose of proving that the defendant was in possession.

9. Although the judgement in ejectment affords conclusive evidence of the plaintiff's right to recover mesne profits from the day of the demise, yet it is not conclusive(*b*) of his right to recover the whole amount against the defendant, for any period antecedent to the service of the declaration in ejectment, even where the defendant in the action was defendant in the ejectment, because the judgement in ejectment is no evidence of the length of time(*c*) during which the defendant occupied the premises.

10. If a party shew that his title accrued before the time of the demise in the ejectment, and that the defendant was previously in possession, the value of the antecedent(*d*) profits may be recovered, but in such case the defendant will be at liberty to controvert the plaintiff's title, and as the demises in ejectment are usually laid shortly after the time when the claimant's title accrued, such antecedent profits seldom(*e*) form the subject of litigation.

11. A recovery in ejectment is conclusive evidence, both of the plaintiff's right to possession, and that the defendant is a trespasser, in an action for mesne profits against the person(*f*) who was defendant in the ejectment, or against any person found in possession, and proved to have come in under the defendant in ejectment, so as to make him privy to the judgement, or against persons served with the declaration in ejectment, but is not producible in evidence against strangers(*g*), and if it appear that the defendant in the action for mesne profits holds under a written agreement, no other evidence than the written instrument is admissible to shew from whom the possession was derived.

12. The action for mesne profits being founded on an injury to the plaintiff's possession, it is incumbent on him, for the purpose of recovering(*h*) compensation in damages for the wrong done, to prove an

(*a*) *Ld. Listowell v. Greene*, 3 Irish Law Rep. 205.

(*b*) *Dodwell v. Gibbs*, 2 Carr. & P. 615; *Jones dem. M'Donnell v. Grady*, 2 Iud. & Br. 537.

(*c*) *Aslin v. Parkin*, 2 Burr. 665; *Dodwell v. Gibbs*, 2 Carr. & P. 615.

(*d*) *Da Costa v. Atkins*, Bull. N. P. 7; and see the note to *Butcher v. Butcher*, 1 Mann. & Ry. 221.

(*e*) *Adams on Ejectment*, 392.

(*f*) *Doe v. Harvey*, 8 Bing. 239; 1 Moore & Sc. 374; *Doe v. Whitcomb*, 8 Bing. 46; 1 Moo. & Sc. 107.

(*g*) *Doe v. Harvey*, 8 Bing. 243; 1 Moo. & Sc. 374; *Denn v. White*, 7 T. R. 112; *Hunter v. Britts*, 3 Campb. N. P. C. 455.

(*h*) *Calvart v. Horsfall*, 4 Espin. N. P. C. 167.

actual entry on the lands, which fact may be established by a compare copy of the writ of possession and return, or by any evidence shewing that the plaintiff has been in possession by consent of the party, though no writ of possession was executed. It is not requisite that the plaintiff should have an actual and exclusive possession in the land, for a party having a right to the premises, acquires(*i*) by entry the lawful possession, and can maintain trespass against any person who afterwards continues wrongfully on the lands; and the mere circumstance of the plaintiff's going upon the premises, and doing any act(*j*) indicating his intention to take possession, without declaring that he entered for that purpose, will be sufficient. It is not necessary that the plaintiff should have had possession at the time of commencing(*k*) his action for mesne profits, but simply at the time when the alleged trespass was committed; and the record in ejectment shews conclusively, that the nominal plaintiff was in possession on the day of the demise in ejectment, and so continued until the alleged ouster: entry, therefore, is not of the essence of the action of trespass for mesne profits, but if the action be founded solely on the judgement in ejectment, unaccompanied by actual possession, it seems that nothing more than nominal damages can be recovered: as this action may be brought before executing a writ of possession, it follows that it will lie(*l*) pending a writ of error.

13. Although a party, after judgement in ejectment, cannot be treated as a tenant, so as to subject him to an action for rent becoming due subsequently to the demise in ejectment, yet where a tenant overholds after the expiration of a regular notice to quit served on him, the landlord may waive(*m*) his action for the mesne profits, and proceed by action of debt under(*n*) the Statute, for double the yearly value of the premises, during the time of the tenant's overholding, but after a recovery in ejectment, founded on notice to quit given by the tenant, the landlord(*o*) cannot maintain any action under(*p*) the Statute for recovery of double rent.

14. Trespass for mesne profits did not lie at common law against executors or administrators, after a recovery in ejectment against the testator or intestate, because(*q*) a personal action died with the person,

(*i*) *Butcher v. Butcher*, 7 B. & Cress. 399; 1 Mann. & Ry. 220, S. C.; *Hey v. Moorhouse*, 6 Bing. New Ca. 52.

(*j*) Co. Litt. 45, B.

(*k*) *Doe v. Wright*, 10 Ad. & Ell. 763; 2 P. & Dav. 762; *Pulteney v. Warren*, 6 Vesey, 84.

(*l*) *Donford v. Ellys*, 12 Mod. 138.

(*m*) *Soulsby v. Neving*, 9 East, 310.

(*n*) 11 Anne, c. 2, s. 1, Irish; 4 Geo. II. c. 28, English.

(*o*) *Soulsby v. Neving*, 9 East, 314.

(*p*) 15 Geo. II. c. 8, s. 9, Irish; 11 Geo. II. c. 19, s. 18, English.

(*q*) *Pulteney v. Warren*, 6 Vesey, 86 and 87; *Birch v. Wright*, 1 T. R. 378; *Bridges v. Smyth*, 5 Bing. 410; 2 Moo. & P. 470; *Barnewall v. Barnewall*, 3

injury committed in the fact constituting the cause of that and where a holding was treated as being founded in trespass, not afterwards be considered as founded in contract: a party prevented from recovering by a rule of the court of law, and an injunction in Equity, which were granted at the instance of the occupier, who ultimately failed, both at law and in Equity, that(*r*) of the mesne profits was, after his death, decreed in favour of his executors, from the time when the title accrued: the circumstance of the death(*s*) of the occupier was not deemed sufficient to entitle a party to equitable relief for recovery of mesne profits against personal representatives, but where such is incidental to other relief, to which the party is entitled, by its interference, will promote the ends of justice. The widow, by the acquiescence of the heir, having entered into possession of certain freehold property, under an erroneous supposition, was entitled to a life-interest in it by the testator's will, and died before the error was discovered, upon a bill filed(*t*) by the next of kin, her personal representative, for delivery of title-deeds, and an account of the mesne profits received by the widow, it was decreed that her executor was accountable for the mesne profits whilst she was in possession.

An Irish Statute(*u*), 3 & 4 Vict. c. 105, s. 31, enacts, that an action for trespass, or trespass on the case, as the case may be, may be brought against the executors or administrators of any person deceased for any wrong committed by him in his life-time to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months *before* such person's death, and such action shall be brought within six calendar months after the executors or administrators shall have taken upon themselves the administration of the estate and effects of such person.

Where trespass for mesne profits is brought against a party and a counter-claim(*v*) against the plaintiff at law, for money expended *on the lands*, an injunction will be granted to restrain the proceedings, as the benefit of the set-off cannot be obtained at law.

The Bankrupt and Insolvent Acts only discharge the debtor

1. 1. Ca. 24-66; Blackwood v. Law Rec. 134, 2nd series.
 Money v. Warren, 6 Vesey, 72.
 Money v. Warren, 6 Vesey, 88;
 v. Barnewall, 3 Ridgw. Parl.

(*t*) Monypenny v. Bristow, 2 Russ. & M. 117-134.

(*u*) 3 & 4 Vict. c. 105, s. 31, Irish; 3 & 4 Will. IV. c. 42, s. 2, English.

(*v*) Lord Cawdor v. Lewis, 1 Younge & Coll. 427.

from debts which he owed to persons who are, or who claim to be, his creditors at the time of his discharge, and damages for a wrong done do not constitute a debt until judgement has been obtained, and therefore a plea of the certificate or discharge(*w*) does not afford any defence to an action for mesne profits, though such mesne profits had previously accrued.

17. In estimating damages in this action, the jury are not not restrained to the mere rent of the premises, but may(*x*) award by their verdict such sum, exceeding the value of the mesne profits, as the circumstances established in evidence shall warrant; but any head-rent which the occupier(*y*) was obliged to pay, and to which the premises were liable, should be deducted. It is a general rule that the costs incurred in recovering possession, may be included in an action for mesne profits, as part of the damages, not only where the ejectment is undefended(*z*), but where a verdict has been obtained either against(*a*) the defendant, or any other person(*b*): the plaintiff may also recover in this action the costs between attorney and client, incurred in a Court of Error, in reversing(*c*) a judgement in ejectment given erroneously in the defendant's favour, although the Court of Error could not have awarded any costs to the plaintiff; and for the purpose of entitling a party to recover the costs of the ejectment in this action, it is not absolutely necessary(*d*), though more convenient, that they should have been taxed by the proper officer. The practice in Ireland is, that the verdict shall be taken, subject to be reduced by any sum which should be deducted from the costs on taxation, and if the ejectment has been defended and the costs have been taxed, no extra costs are allowed(*e*) to be recovered in the action for mesne profits. The plaintiff is also entitled to recover in this action, compensation for waste, or injury done to the premises, by carrying away fixtures which were not removeable by a tenant, or by committing other spoil or waste on the premises, provided(*f*) such matters are specially alleged in the declaration.

(*w*) *Lloyd v. Peell*, 3 B. & Ald. 407; (53 Geo. III. c. 102, Eng.); *Moggridge v. Davis*, Wightw. 16; *Rose*, 120; *Goodtitle v. North*, 2 Dougl. 584.

(*x*) *Goodtitle v. Tombs*, 3 Wils. 118.

(*y*) *Doe v. Hare*, 4 Tyrw. 29; 2 Cro. & M. 145; 2 Dowl. Pr. Ca. 245, S. C.

(*z*) *Doe v. Davis*, 1 Espin. N. P. C. 358.

(*a*) *Symonds v. Page*, 1 Cro. & Jerv. 29.

(*b*) *Love v. Reilly*, 2 Huds. & Br.

185, note; *Pry v. Donovan*, 2 Huds. & Br. 184.

(*c*) *Nowell v. Roake*, 7 B. & Cr. 404; 1 M. & Ry. 170; and see *Caruth v. Ld. Northland, Hayes*, 544.

(*d*) *Symonds v. Page*, 1 Cro. & Jerv. 29; *Pry v. Donovan*, 2 Huds. & Br. 184.

(*e*) *Brook v. Brydges*, 7 Moore. 471; *Doe v. Hare*, 4 Tyrw. 31; *Caruth v. Ld. Northland, Hayes*, 544.

(*f*) *Dunn v. Large*, 3 Doug. 335.

18. If a landlord defend an ejectment in the name of his *pauper* tenant, the Court will, on a summary application, after judgement in favour of the lessor of the plaintiff, compel the *real(g)* defendant, though not a party to the record, to pay the costs of the suit, and before trial, proceedings will be stayed(*h*) until security for costs shall be given.

19. The venue in this action must be laid in the county where the lands are situated, and the declaration should set out the description of the premises which were recovered in ejectment, and should state when the plaintiff(*i*) was ejected, how long he was kept out of possession, the value of the mesne profits, and should specify any waste, or injury done to the property, for which compensation is claimed, and the costs of the ejectment should be included in the statement of damages.

The general issue in this action is "not guilty," but the defendant will not be suffered, under this plea, to shew that the plaintiff, before action brought, agreed to relinquish the costs of the ejectment, in consideration(*j*) of the payment by defendant of the rent of the premises for the time in dispute; such defence is, in substance, that part of the damages had been accepted in satisfaction of the whole: however, under this plea, evidence is admissible to shew that the defendant did not receive any rent out of the premises after the day of the demise in ejectment, in consequence of an agreement(*k*) between the parties to that effect, as the omission to receive the rent is to be considered a relinquishment of possession by the defendant. The defendant may protect himself by the Statute of Limitations(*l*) against any demand for mesne profits accruing more than six years before action brought. If the plaintiff recover less than forty shillings for his damages(*m*) in this action, he will not be entitled to more costs than damages, unless the judge(*n*) certify that the title came in question.

20. Mesne profits may be recovered by civil bill, where the damages claimed(*o*) do not exceed ten pounds, whether the possession of

(*g*) Doe *dem.* Masters *v.* Gray, 10 B. Cress. 615; Thrustout *dem.* Jones *v.* Denton, 10 B. & Cress. 110; 5 M. & W. 443, S. C.; Lloyd *v.* Evans, 1 Villm. Woll. & Dav. 50, *ante*, 1071; and see Doe *dem.* Wright *v.* Smith, 8 Bowll. Pr. Ca. 517; Hayward *v.* Giffard, Mees. & W. 194.

(*h*) Egan *v.* Kirkaldy, Longf. & T. 47; Ball *v.* Ross, 1 Mann. & Gr. 445.

(*i*) Higgins *v.* Highfield, 13 East, 407;

1 Chitty's Plead. 222.

(*j*) Doe *dem.* Hill *v.* Lee, 4 Taunt. 459.

(*k*) Bradshaw *v.* Morris, 1 Irish Circ. Rep. 213, by Pennefather, Baron.

(*l*) Bull. N. P. 88.

(*m*) Doe *v.* Davis, 1 Espin. N. P. C. 358.

(*n*) 2 Geo. I. c. 11, s. 14, Irish; 22 & 23 Car. II. c. 9, s. 136, English.

(*o*) Doyle *v.* Fenlon, 1 Crawf. & D. Circ. Ca. 66.

the premises be recovered by civil bill, or by judgement in ejectment in the superior courts.

21. A lessor is entitled, by the common law, to have the demise of the premises from the time of his re-entry(*p*) for a forfeiture, as if no lease had ever been made, and he is entitled to the same remedies for recovery of all arrears of rent due to him out of the lands at the time of his re-entry, as if there had been no eviction, notwithstanding by such re-entry "he is to have the premises again as if no lease had been granted."

The Irish Statute(*q*), 5 Geo. II. c. 4, s. 2, gives the landlord, after judgement and execution in ejectment for non-payment of rent, the same remedy for all arrears of rent to the time of execution executed, he might have had against the lessee, or his assigns, if no such ejectment had been brought, or judgement and execution had been obtained, or executed thereon: and by the Irish Statute(*r*), 56 Geo. III. c. 88, s. 4, it is enacted, that every landlord recovering possession by civil bill decree, shall have the same remedy for all arrears of rent to the time of execution of such decree, as such landlord might have had, if possession had(*s*) (not) been obtained under such decree. If the demised premises were granted by indenture, the landlord may bring debt, or covenant for non-payment of the reserved rent, or if holden by an equitable article, or accepted proposal for a lease, the rent in arrear may be recovered in an action for use and occupation, down to the time of executing the writ of possession, from such person as would have been answerable for the rent, if no such ejectment had been brought. Upon a point saved, it was decided that the lessor of the plaintiff, after execution executed in an ejectment, for non-payment of rent, was entitled by action(*t*) of trespass to recover the mesne profits from the day of the demise laid in the ejectment, and that the remedy given by the Statute was cumulative.

(*p*) *Hartshorne v. Watson*, 4 Bing. N. C. 178; 5 Scott, 506; *Pennant's case*, 3 Rep. 64, A.; 1 Ro. Abr. 596, Dett. H. pl. 17.

(*q*) 5 Geo. II. c. 4, s. 2, Irish.

(*r*) 56 Geo. III. c. 88, s. 4, Irish.

(*s*) The word "not" appears to have been omitted in the Statute by mistake.

(*t*) *Sinclair v. Barter*, in the Common Pleas, 10th May, 1811; *Ld. Norbury, Fox & Fletcher*, (Mayne, J. dissenting); and see *Uniacke v. Howard, Batty*, 436.

CHAPTER XVII.

SUBLETTING ACTS.

1. *Objects of the original Act against Subletting.*
2. *Alterations made by amended Act.*

10. *Clause in original Act, restricting voluntary Assigns. Alienation by Devise.*

ORIGINAL STATUTE.

3. *Underlease, or Assignment, made between June, 1826, and March, 1832, invalidated, unless by written Consent.*
4. *Doctrine of constructive Waiver abolished.*
5. *Lessees for ninety-nine Years, or for Lives renewable for ever, excepted.*
6. *Lessee underletting without Consent may avoid the Lease.*
7. *Neither Rent, nor Covenants in Underlease, without Consent, can be enforced.*
8. *Nature of requisite Consent for Alienation.*
9. *Prohibitory Clauses only extend to*

AMENDED ACT.

11. *Extends only to Leases forbidding Alienation. And avoids constructive Waiver.*
12. *Middleman deprived of Remedy for Recovery of Rent. Or of Possession.*
13. *Consent required by amended Act.*
14. *Protection given to Under-lessees against Distress for Rent by Head-landlord. And to Assigns.*
15. *Precautionary Measures to be observed by Lessor.*
16. *Regulations in respect of Assignments by Operation of Law.*

1. THE primary object of the Subletting Act(a) was to prevent the effect of conditions or covenants forbidding alienation, from being defeated by means of any constructive or implied dispensation or waiver, arising from receipt of rent by the landlord, or from any partial or temporary license, and in that manner to obviate, in some degree, the evils occasioned by the sub-division of farms, and by the number of tenants intermediate between the original lessor and the occupier.

The first Subletting Act(b) was retrospective in its operation, by avoiding any constructive waiver of an express clause against underletting or assigning, although such proviso had, prior to the Statute, been rendered wholly unavailing by the temporary license or implied assent of the landlord, and the Statute had the effect of restoring the condition or covenant, and of enabling the landlord to enforce its provisions upon any subsequent breach: and where lands were holden under any lease, or agreement for a lease, made after the 1st of June, 1826, though not containing any prohibitory clause against underletting or assigning, the Statute(c) rendered an underlease, or assignment of the whole, or

(a) 7 Geo. IV. c. 29, Irish.
(b) 7 Geo. IV. c. 29, Irish.

(c) 7 Geo. IV. c. 29, s. 3.

of any part of the demised premises, void and invalid *to all intents and purposes*, unless ratified by the written consent of the landlord, thereby introducing into the contract a material stipulation, which probably ~~was~~ not contemplated by either of the parties at the time of making the demise : and persons who were prohibited from assigning or underletting, by any lease(*d*) made *prior* to the month of June, 1826, or persons holding for a less period than ninety-nine years, or without any covenant for renewal, by virtue of leases made *after* the 1st of June, 1826, were deprived of any right or power to divide or distribute the demised premises, by any testamentary disposition, between two or more individuals.

2. Many well-founded objections were made against these enactments, and an amended Statute(*e*) was passed on the subject, repealing the former Act(*f*), but providing that all leases(*g*) made in the interval between the 1st of June, 1826, and the 1st of May, 1832, and all clauses therein contained, should be governed by the provisions of the original Act against subletting.

The first section of the Statute 7 Geo. IV. c. 29, only applies to leases, or to written agreements for leases, made prior to the 1st of June, 1826, containing any condition or covenant, prohibiting or regulating the assigning or underletting of the lands or tenements comprised in such leases or agreements, and avoids any constructive or *parol* waiver of such clause against alienation ; but the validity of an assignment or underlease is not affected by this section of the Statute, further than the express provisions of the lease or agreement, between the chief landlord and his immediate tenant, shall extend. The second section(*h*) is also merely applicable to leases, or written agreements for leases, made prior to the 1st of June, 1826, containing a clause forbidding alienation, and any person making an assignment or underlease contrary to the Act, is thereby deprived of any remedy, by distress, or otherwise, for recovery of rent reserved by such assignment or underlease, or of any remedy for the occupation of the premises assigned or underlet.

The preceding enactments having been repealed and amended, provisions being substituted by the Statute 2 Will. IV. c. 17, any further observations on the subject may be more conveniently introduced, in treating of the latter Statute.

(*d*) 7 Geo. IV. c. 29, s. 9.
 (*e*) 2 Will. IV. c. 17, Irish.
 (*f*) 7 Geo. IV. c. 29, Irish.

(*g*) 2 Will. IV. c. 17, s. 10.
 (*h*) 7 Geo. IV. c. 29, s. 2, Irish.

3. The third section(*i*) which relates exclusively to leases, or agreements for leases, made after the 1st of June, 1826, and before the 1st of May, 1832, enacts, that where lands are holden under a lease, or agreement for a lease, made after the 1st of June, 1826, not containing a clause expressly authorizing the tenant to assign, or underlet, it shall not be lawful for such lessee or tenant, his heirs, executors, administrators, or assigns, to assign or underlet, either by written instrument or otherwise, the demised premises, or any part thereof, without the express consent of the landlord, his heirs, executors, administrators, or assigns, testified where such assignment, or underlease, shall be made, by deed or written instrument, by his or their being party to, and signing and sealing such deed or written instrument, or by his or their written endorsement on such deed or instrument, ratifying the same; or where the assignment or underlease shall not be by deed or written instrument, testified by his or their consent in writing: and that every such assignment or underlease, and every lease, deed or instrument, or other agreement or *proceeding*, whereby such assignment or underlease shall be made, without such consent so testified, shall be and be deemed wholly void and invalid, to all intents and purposes whatsoever, unless such consent shall be endorsed or executed in writing as aforesaid.

4. And that in any proceeding in law or Equity relating to such assignment or underlease, the party so assigning or subletting, or the party to whom such assigning or subletting shall be made, or attempted to be made, shall not be entitled to avail himself of any constructive or parol waiver of the benefit of the said Act by, or on behalf of any such lessor or contracting party.

5. Leases for a term(*j*) of ninety-nine years or upwards, or leases for lives or years, with covenant for perpetual renewal, or a lease held immediately under any persons or bodies corporate or ecclesiastical, or held under any person or persons deriving from the immediate lessee of persons or bodies corporate or ecclesiastical, with a *toties quoties* covenant for renewal, or leases or agreements for leases, containing clauses expressly(*k*) authorizing the lessee or tenant to assign or underlet, are excluded from the operation of this section.

6. The provisions of the second section(*l*) which take away all remedies for recovery of rent, are not applied to assignments or underleases made subsequently to June, 1826, being wholly unnecessary,

(*i*) 7 Geo. IV. c. 29, s. 3.

(*j*) Section 3.

(*k*) *Bernard v. Conner*, Alc. & Nap.

237.

(*l*) Section 2.

because such assignments and underleases are rendered invalid by the third section(*m*), and neither the assignee nor undertenant have any title to the possession, nor the assignor, nor person underletting any title to the rent, as the tenancy itself, and every agreement or *proceeding*, whereby such assignment or underlease could be effected, are made inoperative until such consent is given as the Statute requires: the original landlord might affirm or disaffirm such assignment or underlease, but until confirmed, there could not be a complete assignment or underlease.

John Derepas being possessed of certain premises for a term of ninety-six years, by indenture dated the 5th day of March, 1829, demised them to Patrick Kirk for a term of eighty-nine years and a half, and he, by deed dated the 11th of August, 1829, demised to the plaintiff Troy for ten years, but Derepas was not a party to, and did not ratify the latter demise. In an action of trespass brought against Kirk by Troy, for turning him out of possession of the demised premises before the expiration of the underlease, it was decided(*n*), on demurrer, that as the lease made to Kirk had been executed after the 1st of June, 1826, and did not contain any clause authorizing him to underlet, the underlease to Troy not having been ratified, as required by the Statute, was wholly inoperative and void between the parties, and that Kirk had a right to resume the possession. Where a lease, made after June, 1826, and before May, 1832, either expressly forbids alienation, or is silent on the subject, any assignment or underlease, without the required consent or ratification, is absolutely void, and neither party to such alienation can derive any benefit from it, if it should be disputed by the other party.

7. A lessee holding by virtue of a lease made after June, 1826, and before May, 1832, which does not forbid alienation, may assign or underlet the premises without or against the landlord's consent, and such intermediate lessor may turn out of possession his own undertenants or assigns, whenever he thinks fit, but whilst they remain in possession they may, with impunity, refuse to pay any(*o*) rent to their immediate lessor, or to perform any covenant entered into with him, provided they can prove the original lease, and shew that the requisite consent was not given by the chief landlord. Upon an ejectment for a forfeiture in assigning without license, where the party held under a

(*m*) 7 Geo. IV. c. 29, s. 3.

(*n*) Troy v. Kirk, Alc. & Nap. 326; Lessee Penny v. Gardner, Alc. & Nap. 345.

(*o*) Troy v. Kirk, Alc. & Nap. 326; Lessee Penny v. Gardner, Alc. & Nap. 345.

lease containing an express condition prohibiting alienation, which was made after June, 1826, and before May, 1832, it was contended(*p*), on behalf of the assignee of the lease, that the assignment was a mere nullity by force of the Act against subletting, and as there was no valid assignment, there could be no(*q*) forfeiture; but the objection was overruled, and the landlord obtained judgement.

8. The consent or license required by the third section(*r*), where the assignment or underlease is made by deed or written instrument, must be given by the reversioner, either by his being a party to, and signing and sealing such deed or instrument, or by his endorsement in writing, ratifying such deed or instrument; and where the assignment or subletting is not effected by deed or written instrument, the consent of the reversioner must be given in writing. No period is fixed by the Statute for the ratification of an assignment or underlease by endorsement, and the requisite consent of the reversioner will be sufficient, if made at any time(*s*) after the execution of the assignment or underlease, but any ratification by a lessor, who had previously disposed of his reversion in the premises, will be unavailing. By lease made in December, 1827, *pur auter vie*, it was stipulated, that if the lessee should assign or underlet the demised premises, or any part thereof, without the consent in writing(*t*) of the lessor, his heirs or assigns, then the demise should, at the election of the lessor, his heirs or assigns, be utterly void: the lessee, by deed made in December, 1829, assigned a moiety of the premises in possession, and the residue, after his own decease, to his son William Davis: this assignment was executed without consent, but after the lessor's death, was ratified in January, 1840, by endorsement under the hand and seal of the heir of the lessor, who was then a minor: upon an ejectment by the assignee of the lease, after his father's death, for recovery of the possession of the residue of the demised premises, it was ruled, that the assignment would have been void under the original Subletting Act, if it had not been ratified by the heir of the lessor, and that his confirmation, though defeasible on the attainment of his majority, was valid in the meantime.

9. The clause in the Statute prohibiting alienation without consent, only extends to voluntary assigns(*u*), or such as come in by act

(*p*) Lessee William Henn v. Graham, K. B. Trin. 1836, MSS.; 5 Law Rec. 23, 2nd series, by the name of Lessee Montgomery v. Graham.

(*q*) Doe dem. Lloyd v. Powell, 5 B. & Cress. 308.

(*r*) 7 Geo. IV. c. 29, s. 3, Irish.

(*s*) Penny v. Gardner, Alc. & Nap. 345; Walker v. Cromelin, 4 Law Rec. 115, 1st series; Carton, *ex parte*, 1 Cr. & D., C. C. 615, a registry case.

(*t*) Savage dem. Davis v. Davis, 4 Ir. Law Rep. 353.

(*u*) Doe dem. Goodbehere v. Bevan,

of the party, and not to assigns by operation of law, and it has accordingly been decided(*v*), that the provisions of this Statute will not defeat or annul an assignment of a lease made by authority of a court of justice, or under the Bankrupt Act.

10. By the ninth section(*w*) it is enacted, that it shall not be lawful for any person, his heirs, executors, administrators, or assigns, who shall hold any lands or tenements under any lease or agreement made or entered into at any time subsequent to the 1st of June, 1826, “and prior to the 1st of May, 1832,” not containing a clause expressly authorizing the tenant to assign or underlet, to devise such lands or tenements, or any part thereof, by his or their last will and testament, so as to divide such lands or tenements among several persons ; but that nothing therein contained shall prevent the inheritance or distribution of any lands or tenements among any persons who would be entitled thereto, according to law, upon the decease of any person or persons dying intestate. Any lease for a term of ninety-nine years or upwards, or a lease for lives or years, with a covenant for perpetual renewal, or a lease held immediately under any person, or bodies corporate or ecclesiastical, or held under any person or persons deriving from the immediate lessee of such persons, or bodies corporate or ecclesiastical, with *toties quoties* covenant for renewal, are exempted from the operation of the preceding enactment.

This section is partially repealed(*x*) by the amended Subletting Act, but continues still in force as to all leases made in the intermediate period between the 1st of June, 1826, and the 1st of May, 1832, and therefore, under any lease which was made during such interval, and does not contain an express authority to alien, or is not comprised within the exceptions, neither the lessee, nor any person deriving under him, can, by his last will, divide the holding between two or more persons, and if the tenant, by his will, dispose of the lands comprised in the lease, he must leave the whole in possession to some one person, for if such lands should be left by will between two or more individuals in possession, so far as such devise or bequest extends, it will be unavailing, and the property will go as if no such disposition had been made. If the lessee or owner of such lease die intestate, the interest in the lands, if held for a term of years, will devolve on his administrator, and will be distributable according to the Statute(*y*) of Distri-

3 M. & Selw. 353 ; Doe *dem.* Cheere *v.* Smith, 1 Marsh, 359 ; 5 Taunt. 695 ; Doe *dem.* Mitchinson *v.* Carter, 8 T. R. 57–300.

(*v*) Comyn *v.* Little, C. B. Easter, 1837, on point saved ; and see 2 Will.

IV. c. 17, s. 9, Irish.

(*w*) 7 Geo. IV. c. 29. s. 9.

(*x*) 2 Will. IV. c. 17, ss. 10 and 11.

(*y*) 7 Will. III. c. 6, Irish ; 22 & 23 Car. II. c. 10, English.

butions, or if the interest be freehold, and be limited to heirs, will pass to the intestate's eldest son, or if he only leave daughters, is divisible between them in equal shares.

11. The amended Subletting Act(*z*) is chiefly founded upon the original Statute, omitting such clauses as were considered impolitic, and re-enacting, with alterations and qualifications, such of its provisions as were deemed salutary : it will, therefore, be requisite to point out the difference between the enactments of these Statutes. The first section of the amended Statute repeals the original Act, but it is enacted, that nothing contained(*a*) in the amended Act shall extend to any lease, instrument, or agreement for a lease, made at any time between the 1st of June, 1826, and the 1st of May, 1832, and that all leases, instruments, and agreements made during such interval, and all covenants, clauses and conditions contained in such leases, instruments, and agreements, shall be subject to, and be governed by the provisions of the original Subletting Act, and that so much(*b*), and such parts of the original Subletting Act as respect such leases, instruments, or agreements, and all covenants therein contained, shall remain in full force and effect : and leases containing any covenant or agreement for perpetual renewal, and leases for the term of nine hundred years or upwards, are altogether excluded from the operation of the amended Act.

The second section(*c*) enacts, that where lands or tenements then were, or shall be holden by virtue of any lease, instrument, or agreement in writing containing any condition, clause, or covenant prohibiting, controlling, or regulating the assigning or subletting of the lands or tenements demised, or agreed to be demised thereby, or of any part thereof, no act, matter, or thing whatever(*d*), *thereafter* to be done or acquiesced in by the lessor, or by his heirs, executors, administrators, or assigns, shall be construed, in any court of law or equity, to be, or to amount to, a waiver of the benefit of any such condition, clause, or covenant ; and that in any action for the breach of any such condition, clause, or covenant, whereof the benefit had not been theretofore(*e*) waived, such lessor or contracting party, and his heirs, executors, administrators, and assigns, shall be entitled to recover the possession of such lands or tenements by virtue of any such condition, or to recover any penalty for such future breach of any such condition, clause, or covenant, according to the provisions thereof respectively,

(*z*) 2 Will. IV. c. 17.

(*a*) 2 Will. IV. c. 17, s. 10.

(*b*) 2 Will. IV. c. 17, s. 11.

(*c*) 2 Will. IV. c. 17, s. 2.

(*d*) After the 24th of March, 1832.

(*e*) Prior to the 24th of March, 1832.

unless it shall be expressly proved, that such assignment or underlease was made with the consent of such lessor or contracting party, his heirs, executors, administrators, or assigns, testified, where such assignment or underlease shall be by deed or written instrument, by his or their being a party to, and signing and sealing such deed or written instrument, or some other deed or instrument containing such consent or where such assignment or underlease shall not be by deed or written instrument testified by his or their consent in writing; or unless the benefit of such condition, clause, or covenant, shall have been expressly waived, by some writing signed by the party or parties entitled to the benefit thereof: and every such assignment or underlease, and every deed, lease, or instrument, or other agreement(*f*) or *proceeding*, whereby such assignment or underlease shall be made, without such consent as aforesaid, and testified as aforesaid, shall be and be deemed, wholly null and void, to all intents and purposes whatsoever. Where any actual waiver(*g*), so made and testified, of the benefit of any condition, clause, or covenant, in any such lease, instrument, or agreement, or of the benefit of this Act on the part of the lessor, or party contracting to lease, or his heirs, executors, administrators, or assigns, shall be proved to have taken place in any one particular instance, such actual waiver shall not be assumed, or construed to extend to any instance, or to any breach of covenant, clause, or condition, other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant, clause, or condition, or of the benefit of this Act.

12. In all cases, the person assigning(*h*) or subletting contrary to this Act without such consent, signified as thereinbefore directed, shall not have, or be entitled to any remedy by distress or otherwise, for the recovery of any rent or sum reserved by any deed, written instrument, or other agreement, by which such subletting or assignment shall be made, or for the occupation of any of the lands or tenements so assigned or underlet, or *for the recovery of such lands*.

The object of the amended Act was to give the lessor the full benefit of any non-alienation clause contained in the lease, and that it should not be waived or defeated by any parol or constructive waiver thereafter(*i*) to be done or acquiesced in by the landlord, but where a condition against alienation had been previously waived or defeated,

(*f*) Taken from a similar provision in the 7 Geo. IV. c. 39, s. 3.

(*g*) 2 Will. IV. c. 17, s. 3; a similar clause in the 7 Geo. IV. c. 29, s. 4.

(*h*) 2 Will. IV. c. 17, s. 4; the cor-

responding clause, 7 Geo. IV. c. 29, s. 2, does not prevent the person underletting from recovering possession.

(*i*) After the 24th of March, 1832.

it was not intended that the Statute should have any retrospective operation by reviving the prohibitory clause as to future breaches. However, leases made between the 1st of June, 1826, and the 1st of May, 1832, are expressly excepted out of the amended Act, and continue subject to the provisions of the original Statute, whether they contain a clause forbidding alienation, or are silent on the subject.

Where a lease was made before June, 1826, with a condition against assigning or underletting, and an assignment of part of the premises was made by the lessee, with the lessor's consent, pursuant to the original Act, or rent was received by the original lessor, with knowledge of an underlease having being granted in violation of the Statute, doubts are entertained whether a further assignment or underlease of the premises by the original lessee or tenant, made after May, 1832, without consent, would be rendered void by the amended Act, or whether the condition had not been defeated by such partial assignment or constructive waiver, as the original Subletting Act has been repealed so far as regards such a lease, and the amended Act does not extend to the breach of any condition which had been waived prior to March, 1832. However, as neither a partial nor constructive waiver could, while the original Statute remained in force, defeat any condition against alienation, it may be inferred that such cases alone are excluded from the operation of the amended Act, in which the condition was waived prior to June, 1826.

The clause(*j*) rendering an assignment or underlease void and invalid, which was made contrary to the provisions of the original Statute, by any person holding under a lease granted after the 1st of June, 1826, has been applied by the amended(*k*) Act to any assignment or underlease made after the 24th of March, 1832, by any person holding under a lease containing a clause prohibiting alienation not theretofore waived, and by the fourth section(*l*) of the amended Act, the person so assigning or underletting, is deprived of any remedy for the recovery of the possession; the consequence is, that an assignment made in violation of the amended Act is absolutely void, and the person assigning the whole or any part of the premises, notwithstanding the invalidity of the assignment, is deprived of any remedy for recovery of the possession of the premises so assigned, or for enforcing payment of any rent, or the observance of any covenant in such assignment; but the original lessor has a right to enter for a condition broken(*m*) or to dis-

(*j*) 7 Geo. IV. c. 29, s. 3.

(*k*) 2 Will. IV. c. 17, s. 2.

(*l*) 2 Will. IV. c. 17, s. 4.

(*m*) Lessee Montgomery v. Graham,
5 Law Rec. 23, N. S.

train for the rent reserved by the original lease. In like manner, if ~~the~~ whole, or any part of the premises be underlet, contrary to the provisions of the amended Act, the person making such underlease, without the requisite consent, is deprived of any remedy for recovery of the possession of the premises so underlet, or of any remedy to enforce payment of rent, by distress or otherwise, for such premises, if it be proved that the original lease comes within the operation of the amended Act, and that the underlease has not been confirmed. The object of the third section(*n*) of the amended Act is to obviate the consequences of the decision in Dumpor's case(*o*), and to prevent a partial dispensation or limited waiver from annulling the condition.

13. The consent, or license, required by the Statute to enable a lessee, holding under a lease, or agreement for a lease, containing a non-alienation clause, to make a valid and complete assignment or underlease, by deed or written instrument, must be effected by the landlord or reversioner joining as a party in, and signing and sealing such assignment or underlease, or by executing some other deed or instrument containing such consent; or if the assignment or underlease shall not be made by deed, or by a written instrument, then the landlord's consent in writing will be sufficient; or the breach of a condition against assigning or underletting, may be waived by any writing signed by the landlord or party entitled to the benefit of such condition. If the tenant be prohibited from assigning or underletting without the landlord's written consent for that purpose, or if any other specified description of license or consent be prescribed by the condition, a compliance(*p*) with such stipulation will be sufficient, because the Statute only directs that the landlord shall recover according to the provisions of such condition. The Statute does not specify any time for giving the landlord's consent to an assignment or underlease, or for waiving a breach of the condition against assigning or underletting, and it has been ruled under the original Act that a consent by the reversioner(*q*) will be sufficient, if given pursuant to the Statute, within a reasonable time(*r*) after execution of the assignment or underlease, and such subsequent consent by a party who then had a right to give it, will complete what was previously but an inchoate assignment, or underlease. However, a verbal assent to an assignment of the lessee's

(*n*) 2 Will. IV. c. 17, s. 3.

(*o*) Dumpor's case, 4 Rep. 119; Dumper v. Syms, Cro. Eliz. 815; Coke's Ent. 684.

(*p*) Ld. Westmeath v. Hogg, 3 Irish Law Rep. 27.

(*q*) Walker v. Cromelin, 4 Law Rec. 115-200, cited in Penny v. Gardner, Alc. & Nap. 347; Savage dem. Davis v. Davis, 4 Irish Law Rep. 353.

(*r*) See Palmer v. Moxon, 2 M. & Selw. 43.

interest by a lessor, who afterwards(*s*) parted with his reversion in the premises, and then ratified the assignment by his consent in writing, was held to be inoperative, because the lessor had no estate in the premises at the time of giving his consent in writing, and such assignment was therefore invalid.

14. Where any person(*t*) or persons being seised or possessed of any lands or tenements in Ireland, under any assignment or subletting, duly made of or under any lease or demise which should be thereafter(*u*) made for any term not exceeding(*v*) three lives or thirty-one years from the commencement thereof, and upon which a rent equal to three-fourths of the annual value of the demised premises shall have been reserved, shall at any time after the 1st day of May, 1832, duly pay and satisfy the rent due from such person or persons, his or their heirs, executors, administrators, or assigns, to the person or persons, or his or their executors, administrators or assigns, who shall have so assigned or underlet such lands or tenements, the receipt of such person or persons so assigning or underletting, or of his or their heirs, executors, administrators, or assigns, shall be a full and sufficient(*w*) discharge to such person or persons who shall have paid such rent, and to his and their heirs, executors, administrators, or assigns, as well against the person so signing or subletting, as also against the lessor or person contracting with the person so assigning or subletting, and the person or persons having paid such rent, or his or their heirs, executors, administrators, or assigns, or his or their goods, chattels, or effects, lands or tenements, shall not be subject or liable to the payment of, or to any distress or other remedy for any rent due to such lessor, or to any person living under him. Ecclesiastical leases, and leases held under any corporation, and leases containing any covenant or compact for renewal, or any lands or tenements situate within any city, town or borough, or the liberties thereof, are excepted out of the preceding section.

In case any lessee(*x*), or lessees of any such lease, or the heirs, executors, or administrators of any such lessee or lessees, shall not duly pay the rent reserved by the lease or instrument under which such lands or tenements shall be held by such lessee or lessees to the party

s) Penny v. Gardner, Alc. & Nap.

t) 2 Will. IV. c. 17, s. 5; the corresponding section, in the 7 Geo. IV. c. 29, only applies to assignments or underleases made with consent of reversioner.

u) After the 24th of March, 1832.

(*v*) The marginal abstract of this section, given in the Statutes at large, is erroneous, being transcribed from the original Act, and disregarding the difference between the two Statutes.

(*w*) Appendix, No. 24, Code Civil de France.

(*x*) 2 Will. IV. c. 17, s. 6.

or parties entitled to receive the same ; it shall be lawful for any party entitled to such rent, at any time when there shall be due to him two or more full gales, or portions of the rent reserved in such lease or instrument, to give notice in writing, in the form annexed to the Act, to all and every person or persons who shall be then in occupation of the lands and tenements which shall have been assigned or underlet, requiring each and every such person to pay to the party giving such notice the rent reserved upon their respective holdings : and after the delivery(y) of such notice to any person or persons in occupation of any such lands or tenements, every such person or persons shall pay to the landlord, giving such notice, or to his heirs, executors, administrators, or assigns, all sums whatsoever, due or to grow due for rent, from such person to the lessee or lessees so having assigned, or subletten, or to his or their heirs, executors, administrators, or assigns : and from and after such notice, and until the satisfaction of all the sums due to the person or persons giving such notice, on account of all rent due from such lessee or lessees having so assigned or subletten as aforesaid, the receipt of the person or persons giving such notice, or his or their heirs, executors, administrators, or assigns, shall be a full and sufficient discharge to the person or persons in the occupation of such lands or tenements, who shall have paid such rent, and to his and their heirs, executors, or administrators, against the person having so assigned or subletten, or his heirs, executors, or administrators : and the person or persons so having paid such rent, or his or their executors or administrators, or his or their goods, chattels, or effects, lands or tenements, shall not be subject or liable to the payment of any rent, or to any distress or other remedy for the same, to any person or persons under whom such person or persons may hold by reason of any such assignment or underlease, until such satisfaction as aforesaid : and it is provided, that leaving the required notice at the house or usual place of abode of any person or persons in the occupation of the premises, either with such person, or with some of the family of such person exceeding sixteen years of age, shall be sufficient service.

From and after the delivery(z) of such notice, and until the satisfaction of all rent and arrears of rent due to the party giving such notice, or his heirs, executors, administrators, or assigns, he and they shall have and enjoy all such rights, powers and authorities, for the recovering and enforcing the payment of any rent due and payable by any person or persons occupying the lands so assigned or underlet, in

(y) 2 Will. IV. c. 17, s. 7.

(z) 2 Will. IV. c. 17, s. 8.

manner aforesaid, as could or might have been legally exercised or enforced against any such person or persons respectively, by the party so assigning or subletting in manner aforesaid.

The fifth, sixth, and seventh sections of the amended Act, were intended to protect persons holding by underleases *duly* made, against a distress by one landlord, for rent which had been previously paid to another, or against a distress by a chief landlord for a larger sum of money than the rent reserved, and made payable by the underlease: the preceding sections are borrowed from the original Statute, but the alterations made in them by the amended Act render the subject extremely obscure, and although materially affecting the interest of landed proprietors, no explanation of the difficulties is afforded by judicial decision, and it would appear, as if by tacit assent, that those measures which were intended for the benefit of undertenants had already become obsolete. The corresponding clauses of the first Subletting Act only extended to assignments and underleases, made with the consent in writing of the original lessor or landlord: the amended Act applies not only to assignments or underleases derived under any lease made after the 24th of March, 1832, not exceeding three lives or thirty-one years from its commencement, upon which a rent equivalent to three-fourths of the yearly value of the premises is reserved, where the license or consent in writing of the original lessor was necessary, and had been procured, but also extends to cases in which alienation is neither controlled nor forbidden, and the consent of the original lessor is not requisite either to authorize or confirm an assignment or underlease.

If a tenant, by lease made after March, 1832, for any term not exceeding three lives or thirty-one years, at a rack-rent, be prohibited from alienation without the lessor's written consent, and make an underlease with the required consent, or if a similar lessee, holding at a rack-rent for any term not exceeding three lives, or thirty-one years, who is not prohibited from alienation, make an underlease, the undertenant, by paying the rent reserved out of his own holding to his immediate lessor, will be discharged from liability for rent to the superior landlord, and will not be subject to any distress or other remedy, for any rent for the same period to the superior landlord; unless after two years of rent shall have accrued due to such superior landlord by his immediate tenant, notice shall have been served on the undertenant, requiring payment of the rent reserved out of his holding, and upon such payment being made, pursuant to the notice, the undertenant is liberated from further liability to the payment of any rent, and his holding from liability to distress, or other remedy for rent to any per-

son under whom such undertenant may hold, by reason of any such underlease, until all sums due to such superior landlord, from the intermediate tenant, shall be satisfied.

15. In case the undertenant, after receiving notice, shall be in arrear for rent due out of his holding, the remedies of the intermediate tenant for recovery of such rent are transferred to the reversioner or superior landlord, but as such superior landlord has a right, at common law, to distrain the lands for his rent, the only additional remedy conferred on him by the Statute, is an action of debt, framed in pursuance of the eighth section(*a*) for such rent, and the reversioner does not obtain any additional remedy by this clause, against an assignee of the lessee's interest. In consequence of the provisions of the amended Act, every lease of premises, unless situated in a town, should contain a proviso, expressly prohibiting any underlease or assignment, without the previous written consent of the landlord, and although the lessor may not intend to enforce compliance with the condition, yet no written consent, authorizing an assignment or an underlease, should be given, because the remedies of the original lessor may be embarrassed or diminished by such written license or consent: the original lessor may acquiesce in the assignment or underlease, by not taking any advantage of the breach of the condition, but until these clauses of the Act receive a judicial construction, defining the effect and operation of such assigning or subletting, upon the rights and remedies of the chief landlord, for recovery of his rent by distress or by ejectment, it will be more prudent for the superior landlord to abstain from giving any such written consent, or from executing any lease which would warrant the grant of an underlease or assignment.

16. Where, under any assignment(*b*) from a sheriff, by virtue of any execution, or under any assignment from executors or administrators, or from the assignee or assignees of any bankrupt or insolvent, or *by operation of law*, devise, or otherwise, any person shall be legally or equitably seised or possessed of any lands or tenements, held under any lease or demise made after the 1st day of May, 1832, and containing any clauses, conditions, or covenants, against assigning or subletting, such person so deriving shall hold such lands and tenements, subject to such clauses, conditions, and covenants in such lease or demise contained, and that as fully as if such person or persons had been the original lessees therein: but where two or more persons shall together

(*a*) 2 Will. IV. c. 17, s. 8.

(*b*) 2 Will. IV. c. 17, s. 9; the ori-

ginal Act does not contain any analogous provision.

become seised or possessed of any lands or tenements so demised, such persons shall take and hold the same as joint-tenants, and not as tenants in common ; and it shall not be lawful for such persons, or any of them, by any deed, matter, or thing, to assign such lands or tenements, save as thereafter provided, nor to sever such tenancy, nor to sue out or demand, or procure to be issued, any writ of partition, or any writ or process in the nature of a writ of partition. Provided, however, that nothing therein contained shall extend to disable any one or more of such persons from assigning to any other, or others of them, his or their estate and interest, the same remaining subject, after such assignment, to such and the like restraints and incidents as attached upon the same before such assignment.

The amended Act only extends to voluntary assigns, and not to assigns by operation of law, and though a lease contain a *general* prohibition against assignment, yet an assignment by the sheriff under an execution, or by the assignees of a bankrupt or insolvent debtor, or by the personal representatives of a deceased lessee for years, or by devise, will not be affected by the provisions of the Statute. Such assigns, however, though taking by operation of law, will become subject to, and bound by all the clauses and conditions of the lease, as fully as if such assigns had been the original lessees, and any subsequent assignment will be controlled and governed by the provisions of the amended Act against assigning or underletting, unless the required license or consent be procured. Where two or more persons become purchasers of the lessee's interest from assignees of a bankrupt or insolvent, or from the personal representatives of a deceased lessee, or take by devise, they must hold as joint-tenants, and not as tenants in common, and they are precluded from making any partition, or severing the joint estate, but each of such assignees may assign or release his share to his companion. This Statute does not interfere with any express condition rendering a lease void, in case the lessee or his assigns commit an act of bankruptcy, upon which a commission shall be founded, or in case the lessee or his assigns shall take the benefit of an Insolvent Act, or in case any judgment shall be recovered against, or acknowledged by the lessee or his assigns, by means of which, either the demised premises, or any part thereof, shall be taken in execution, or any order shall be made by a Court of Equity, for the appointment of a receiver over the whole or any part of the demised premises.

CHAPTER XVIII.

STATUTES OF LIMITATION.

1. *Limitation of Time as to Realty by the Irish Statute, 10 Car. I. Sess. 2, c. 6.*
2. *Statute 3 & 4 Will. IV. c. 27. Abolition of real Actions.*
3. *Period of Limitation.*
4. *Accruer of Right, when Party in Possession.*
5. *Where a deceased Person was last in Possession.*
6. *Where a Grantor was last in Possession.*
7. *As to reversionary Estates and future Interests.*
8. *Forfeiture, or Breach of Condition.*
9. *Summary of Periods when Right accrues.*
10. *Statute 7 Will. IV. & 1 Vict. c. 28, as to Mortgagees.*
11. *Bar of twenty Years extends beyond the Instances specified in the third Section.*
12. *Rents reserved on Leases are not included in the second Section.*
13. *Adverse Receipt of Rent reserved by Lease, amounting to twenty Shillings yearly, by Stranger.*
14. *Operation of Statute as to Tenancies at Will.*
15. *As to yearly Tenancies.*
16. *Difficulties of Proof imposed on Land-owners.*
17. *Forfeiture Clause inapplicable to Conditions in Leases.*
18. *Reversioner not affected when rightfully dispossessed by Owner of particular Estate.*
19. *Concurrent Rights barred.*
20. *Executors, Administrators, Devisees, and Heirs.*
21. *Possession by Joint-tenants, or Tenants in common.*
22. *Or by younger Brother.*
23. *Written Acknowledgement of Title.*
24. *Exception in Cases of Disability.*
25. *Adverse Possession.*
26. *Accommodation Clause at an End.*
27. *Limitation as to Suits in Equity. Express Trusts.*
28. *Concealed Frauds.*
29. *Mortgagor out of Possession.*
30. *Charge of Money upon Land.*
31. *Legacies.*
32. *Devises in Trust for Payment of Debts.*
33. *Limitation as to Arrears of Rent, or Interest.*
34. *Twenty Years' Rent reserved by Lease recoverable.*
35. *Where Rent or Interest recoverable for not more than six Years.*

1. CERTAIN limited periods for the assertion of legal rights form an essential part of every system of jurisprudence, and may be considered, first, as the means of conferring by lapse of time a title to lands, or to servitudes arising from lands, and secondly, as the means of extinguishing obligations, by depriving their owner of the benefit of any action for their recovery.

In former times the title to land was determined by real actions, but in consequence of such remedies being final, the mixed action of ejectment was introduced, which did not purport to bind the right to the freehold, and only decided who was entitled to the possession. The Irish Statute(a), 10 Car. I. sess. 2, c. 6, for the further quieting of

(a) 10 Car. I. Sess. 2, c. 6, ss. 12 and 13, Irish; 21 Jac. I. c. 16, ss. 1 and 2, Eng.

men's estates, and of avoiding suits, enacted, that no person should make any entry into any lands, but within twenty years after his right shall *first* descend, or accrue to the same, and in default thereof, such persons not so entering, and their heirs, were utterly excluded and disabled from such entry after to be made: excepting, however, infants, married women, persons insane, imprisoned, or beyond seas, who were allowed ten years to make their entry after such disability removed.

This Statute allowed the party to whom a right of entry, or in other words, "a right to bring an ejectment," accrued, and who was then under disability, ten years after the(*b*) removal of such disability, notwithstanding the twenty years had elapsed, after his title had first accrued: and such period of ten(*c*) years did not run at all, while there was a continuance of disabilities, but ran without intermission from the time such disability was removed. An outstanding lease also prevented the Statute from running(*d*) against a landlord during its continuance, and though no rent was received for more than twenty years before it expired, he might recover possession by ejectment at any time within twenty years after the term had expired, as no right or title was held barred by the Statute, unless accompanied by a right of possession, and the landlord was not obliged to take advantage of a forfeiture incurred by non-payment of rent. The chief difficulty under this old Act, was to ascertain what(*e*) constituted adverse possession, and from what time it commenced, and the embarrassment on this subject does not seem to be materially diminished by the recent Statute.

2. By the Statute(*f*), 3 & 4 Will. IV. c. 27, all real and mixed actions are abolished, with the exception of dower, *quare impedit*, and ejectment.

3. The period of limitation adopted by the recent Act is twenty years(*g*), and every person is prohibited from making an entry or distress, or bringing an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the claimant, or to any person by, through, or under whom, or by whose act the claimant became entitled.

4. The mode of ascertaining the time when the right first accrued

(*b*) Doe *dem.* George *v.* Jesson, 6 East, 80.

(*c*) Cotterell *v.* Dutton, 4 Taunt. 826.

(*d*) Doe *dem.* Cook *v.* Danvers, 7 East, 299; Doe *dem.* Orrell *v.* Madox, Runn. Ej. 458.

(*e*) Doe *dem.* Roffey *v.* Harbrough, 1 Nev. & M. 422; 3 Ad. & Ell. 67.

(*f*) 3 & 4 Will. IV. c. 27, s. 36, Eng. & Irish.

(*g*) Section 2.

is pointed out by the third section(*h*), which enacts, that when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was received.

5. And when the person claiming such land or rent, shall claim the estate or interest of some *deceased* person, who shall have continued in such possession or receipt in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

6. And when the person claiming such land or rent, shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

7. And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or(*i*) *other future estate or interest*, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

8. And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to

(*h*) Section 3: Toutes les actions tant réelles que personnelles sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre, ou qu'on puisse lui opposer

l'exception deduite de la mauvaise foi. Code Civil, No. 2262.

(*i*) Doe *dem.* Johnson *v.* Liversedge, 11 Mees. & W. 517.

have first accrued when such forfeiture was incurred, or such condition was broken.

9. The periods from which the right is to be considered as having accrued, are, first, in the case of an estate in possession, from the time of dispossession; secondly, where a person dies in possession, from the time of his death; thirdly, where a person claims by grant or alienation, from the time of such alienation; fourthly, in case of a reversionary or future estate or interest, from the time of its coming into possession; and fifthly, in case of forfeiture or breach of condition, from the period of such forfeiture incurred or condition broken.

10. Doubts being entertained, whether it was not necessary for a mortgagee out of possession, to bring his action within twenty years after default in payment(*j*) of the mortgage debt, though interest had been regularly received, it was enacted(*k*), that it should be lawful for any person entitled to, or claiming under any mortgage of land, to make an entry, or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action, or suit in equity, shall have first accrued.

11. The object and intent of the third section of the Act was held, after some hesitation, merely to be, to explain and give a construction to the general(*l*) enactment contained in the second section, in respect of the time at which the right to make a distress should be deemed to have *first* accrued, and not to limit its application to those five instances only which are enumerated in the third section, and which are to be considered as declaratory, and not restrictive. A devisee of a rent-charge created by will, who never received any payment, having distrained for the whole arrear which accrued during a period exceeding twenty years, it was decided on special verdict(*m*), that such rent-charge was included in the second section, and the twenty years would run when the right to distrain for it first accrued.

12. The word "rent," in the second and third sections, is confined to rents existing as an inheritance distinct from the land, and has no reference to rents reserved on leases for years by contract between the

(*j*) *Doe dem. Jones v. Williams*, 5 Ad. & Ell. 291; 6 Nev. & M. 816, S. C.; and see *Searle v. Colt*, 1 Yo. & Coll. in Chanc. 36-44.

(*k*) 7 Will. IV. & 1 Vict. c. 28, English & Irish.

(*l*) *James v. Salter*, 3 Bing. N. C. 544; 4 Scott, 168; overruling same case, 2 Bing. N. C. 505; 2 Scott, 750, S. C.

(*m*) *James v. Salter*, 3 Bing. N. C. 544; 4 Scott, 168.

parties as a conventional equivalent for the right of occupation : where a lease was granted by indenture for ninety-nine years, provided certain persons should so long live, subject to a yearly rent, it was decided that(*n*) although no rent was paid out of the premises for upwards of twenty years, the reversioner, on the expiration of the term, was entitled to recover the possession, as by the express provisions of the third section, the right to the reversion is to be deemed to have first accrued when the estate falls into possession, unless some third person shall, in the meantime, have got into wrongful receipt of the rents. Upon an ejectment for non-payment of rent in Ireland, it was ruled(*o*) that a landlord who had not received any rent, for a period of twenty years, from his tenant holding under a freehold lease, was deprived, by the Statute, of any remedy for its recovery, and that the lessee had a right to enjoy the demised premises rent free for the unexpired residue of the term : it was, however, subsequently settled, that the rights of the reversioner(*p*), which are to be enforced when the particular estate is determined, being preserved, it could not have been intended that those rights, which exist as incidents to the reversion during the continuance of that particular estate, should be extinguished, and that this Act does not apply to a rent incident to a reversion expectant on the determination of a lease for lives or for years. The possession of an undertenant is the possession of his immediate lessor, and an admission made by the middleman(*q*) during the continuance of his tenancy of payment of rent by him to the superior landlord, out of the demised premises, is evidence against the undertenant, who cannot defeat the title of the head-landlord by discontinuing the payment of rent to his immediate lessor.

13. Although the retention of rent by a lessee for any number of years during the continuance of his lease, does not confer any title on the tenant against the landlord, yet if the rent reserved(*r*) by a lease in writing, amounting to twenty shillings yearly, or upwards, be received for twenty years by an adverse claimant to the reversion, and no rent be received in the meantime by the rightful landlord, the time

(*n*) Doe *dem.* Davy *v.* Oxenham, 7 Mees. & W. 131; Chadwick *v.* Broadwood, 3 Beav. 308.

(*o*) Doe *dem.* Mannion *v.* Bingham, 3 Irish Law Rep. 456.

(*p*) Grant *v.* Ellis, 9 Mees. & W. 113; Daly *v.* Ld. Bloomfield, 5 Irish Law Rep. 65-76; Ceux qui possèdent pour autrui, ne prescrivent jamais par quelque laps, que ce soit : ainsi le fermier, le deposi-

taire, l'usufruitier, et tous autres qui detiennent precairement la chose du propriétaire, ne peuvent la prescrire, Code Civil, No. 2236.

(*q*) Doe *dem.* Bell *v.* Beckett, 7 Jurist, 532.

(*r*) 3 & 4 Will. IV. c. 27, s. 9; see the First Report of The Real Property Commissioners.

begins to run against such rightful owner from the period when the adverse claimant entered into receipt of the rent: the receipt of rents and profits is considered equivalent to the occupation of the soil, as the person receiving such rents can do nothing more to establish his rights, and the person to whom they are denied is virtually dispossessed: but where no rent, or a rent merely nominal, not amounting to twenty shillings, is payable, the negligence of the reversioner is very slight, in not requiring an acknowledgement of his title from the tenant, and in such cases a commencement of adverse possession(*s*) does not arise, either by payment of such nominal rent to a third person, or by its retention, until the expiration of the lease. The receipt of the rent payable by any tenant(*t*) from year to year, or other lessee, as against such lessee, or any person claiming under him (but subject to the lease) is to be deemed the receipt of the profits of the land.

14. When any person shall be in possession(*u*), or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; but it is provided that no mortgagee or *cestuique trust* shall be deemed to be a tenant at will to his mortgagee or trustee.

Tenant at will does not acquire a title, under this Act, unless he continues in possession, for otherwise a party who held, as tenant at will, for a year, and then continued in possession for twenty years(*v*), without paying rent, might, at any subsequent period after giving up possession, claim title to the premises, and turn out his landlord, and might go back to an unlimited period of time for the possession on which his claim was founded. The same individual must continue to hold as tenant at will, and to enjoy the same tenancy during the whole period of twenty years, for by his death, or transfer of possession during such period, the original tenancy is determined, and it will depend on the acts of the parties whether the new occupant is to be deemed(*w*) a

(*s*) *Grant v. Ellis*, 9 Mees. & W. 126.

(*t*) Section 35.

(*u*) Section 7, as to possession by tenant at will.

(*v*) *Doe dem. Thompson v. Thompson*,

6 Ad. & Ell. 721; 2 Nev. & P. 656.

(*w*) *Turner v. Doe dem. Bennett*, 9 Mees. & W. 643; *Doe dem. Stanway v. Rock*, 4 Mann. & Gr. 30.

trespasser or tenant at will. Possession by tenant at will, or by a tenant holding without any lease in writing, and not paying any rent during a period of twenty-one years, partly before, and partly since the Statute, or wholly since, not only deprives the lessor, and every person deriving from him, of any remedy for recovery of rent or of possession, but(*x*) absolutely destroys the lessor's estate, and transfers to the tenant or occupier the ownership of the property: this section, however, only applies to tenancies at will existing when the Act passed, or subsequently created, and not to a tenancy(*y*) which had been determined, and was not existing at the time of passing the Act.

A person being let into possession in the year 1817 as tenant at will, the lessor, in the year 1827, entered upon the land without the tenant's consent, and raised and carried away stone from the premises, and in the year 1829 the tenant signed an assessment for land-tax in the parish, in which the lessor of the plaintiff was named as the proprietor: the landlord's entry was clearly a determination of the(*z*) tenancy, for otherwise such an act would be wrongful, but the tenant was permitted to remain in possession without ever paying rent, until the landlord, in 1839, brought his ejectment: it was contended, that after the lapse of twenty-two years without receipt of rent, the lessor's right was barred, but it was ruled, that if the tenancy throughout the whole period from 1817, had been one continuous holding at will, or if, when the original tenancy was determined in 1827, no new tenancy at will had been created, and the tenant had continued to occupy merely at sufferance, that the ejectment could not be sustained: if, however, the estate at will was put an end to in 1827, and a new holding at will was then constituted, of which the assessment afforded evidence, the jury were warranted in finding the creation of a new tenancy, and the ejectment was brought in proper time. A person acquiring and holding land in the character of a servant(*a*) at a yearly stipend, for a period exceeding twenty years, does not come within the operation of the Statute, and cannot defeat the right of the land-owner to recover possession.

15. When any person shall be in possession, or in the receipt of the profits(*b*) of any land, or in receipt of any rent as tenant from year

(*x*) Doe *dem.* Stanway *v.* Rock, 4 Mann. & Gr. 30; Carr. & M. 549, S.C.; Hunter, *dem.* Ellis *v.* Crawford, 5 Irish Law Rep. 402; Longf. & T. 664.

(*y*) Doe *dem.* Evans *v.* Page, 8 Jurist, 399.

(*z*) Doe *dem.* Bennett *v.* Turner, 7 Mees. & W. 226; Turner *v.* Doe *dem.*

Bennett, 9 Mees. & W. 643; Doe *dem.* Bennett *v.* Long, 9 Carr. & P. 773.

(*a*) Lessee Moore *v.* Doherty, 5 Irish Law Rep. 449; Hunter *dem.* Ellis *v.* Crawford, 5 Irish Law Rep. 402.

(*b*) Section 8, as to tenants from year to year, or other period, without writing.

to year, or other period, *without any lease in writing*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land, or rent, shall be deemed to have first accrued at the determination of the first of such years, or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing an action or suit, the right(c) and title of such person to the land, or rent, for the recovery whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished.

Where lands are holden from year to year, or for any other period, without any written demise, at a rent payable in March and September, and the lessor receives, in September, 1830, the rent due in the preceding March, if the rent be afterwards retained by the lessee, or paid by him to an adverse claimant, the period of limitation begins running from September, 1830, when the rent was last received by the rightful owner, and by such retention of rent, or continuance of wrongful payments for twenty years, the lessor's title becomes absolutely extinguished.

16. Great difficulties are imposed by this Act on persons who permit tenants to occupy cottages at small rents; for though the rent may be occasionally discharged, and receipts given by the landlord, yet after the lapse even of a few years, the burthen of proving such payment devolves on the claimant, and the receipts are seldom forthcoming for that purpose: written acknowledgements should therefore be procured from time to time, that such payments were made by the tenants for their occupation.

17. The clause contained(d) in the third section, that the right of any person becoming entitled by reason of any forfeiture or breach of condition, shall be deemed to have first accrued when such forfeiture was incurred, or condition broken, seems to have been rendered wholly inoperative, so far as regards conditions in leases, by the fourth section(e), which enables the landlord or reversioner to waive the forfeiture, and retain his right to recover possession on the expiration of the lease.

18. The right of a reversioner is not affected(f), in consequence

(c) Section 34, right of party out of possession, after limited period, becomes extinct.

(d) 3 & 4 Will. IV. c. 27, s. 3.

(e) Section 4.

(f) Section 5.

of his *rightful* dispossession by the owner of a particular estate, after such estate shall have determined.

19. Where a person is *wrongfully* dispossessed of a particular estate, the lapse of twenty years not only defeats the particular estate, but any other concurrent(*g*) right in the same land, or rent, to which the owner was entitled in possession, or reversion, during such period, unless in the meantime such land, or rent, shall be recovered(*h*) by some person entitled to an estate, interest, or right, taking effect after, or in defeasance of such estate or interest in possession.

20. An administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed(*i*) administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person, and the grant of such letters of administration; with regard to executors, devisees, and heirs, where the testator, or ancestor, died in possession of the land, or in receipt of the profits, the period of limitation(*j*) begins to run from the decease of the testator or ancestor.

21. When any one or more of several persons entitled to any land, or rent, as co-parceners(*k*), joint-tenants, or tenants in common, shall have been in possession, or in receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons, other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of, or by such last-mentioned person or persons, or any of them.

22. The possession of the land, or receipt of the profits by a younger brother(*l*), or other relation of the person entitled as heir, is not to be deemed the possession, or receipt of the heir himself.

23. But when any acknowledgement of the title of any person entitled to any land or rent, shall have been given to him or his agent in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of, or by the person by whom such acknowledgement shall have been given, shall be deemed(*m*) to have been the possession or receipt of,

(*g*) Sect. 20, as to concurrent rights.

(*h*) Doe *dem.* Johnson *v.* Liversedge, 11 Mees. & W. 517.

(*i*) Section 6, as to administrators.

(*j*) Section 3.

(*k*) Section 12, as to joint-tenants, &c.; Hasell, *ex parte*, 3 Yo. & Coll. Exch. 617; Culley *v.* Doe *dem.* Tayler-

son, 11 Ad. & Ell. 1008; 3 P. & Dav. 539; Lessee O'Sullivan *v.* M'Sweeny, Jones & C. 295; 2 Irish Law Rep. 89; Longf. & T. 111.

(*l*) Section 13.

(*m*) Sections 14 and 40, acknowledgement of title in writing.

or by the person to whom, or to whose agent, such acknowledgement shall have been given, at the time of giving the same : and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at, and not before, the time at which such acknowledgement, or the last of such acknowledgements, if more than one, was given.

In order to render an acknowledgement effectual, within the meaning of the Act, it must be given with an intention to admit the lessor's title, and if only made(*n*) with a view to an ulterior arrangement, will not be binding. A trustee, who is the party by whom money charged on land is payable, may(*o*) acknowledge the debt by a writing signed by himself or his agent, and such an acknowledgement will not impose on him any personal liability to pay the debt : the Act allows of considerable latitude as to the form of the acknowledgement, and consequently it is not necessary that it should state the amount of the sum alleged to be due, being quite sufficient, if it refers to the thing in question. The admission of a debt in the schedule of an insolvent(*p*) is sufficient to prevent the bar of the Statute.

24. When the right to make an entry or distress, or bring an action to recover any land or rent, first accrues, and the person entitled is under(*q*) any of the disabilities of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, notwithstanding the period of twenty years has expired, ten years further time is allowed, to be computed from the death of such person, or of his having ceased to be under such disability, whichever shall have first happened: and though such person continue(*r*) under such disability till his death, no further enlargement of the time is allowed on account of the disability of any succeeding claimant: provided, however, that no entry, distress, or action shall be made or brought by any person, who, when his right shall have first accrued, shall be under such disability, or by any person claiming through him, *but within forty years* after(*s*) such right first accrued ; though the person under disability at such time has re-

(*n*) Doe *dem.* Curzon *v.* Edmonds, 6 Mees. & W. 295; Holland *v.* Clark, 1 Yo. & Coll. in Chan. 169; Incorporated Society *v.* Richards, 1 Dru. & Warr. 290; Fursdon *v.* Clogg, 10 Mees. & W. 572.

(*o*) Ld. St. John *v.* Boughton, 9 Sim. 219.

(*p*) Dugdale *v.* Vize, 5 Irish Law Rep. 568; Morrogh *v.* Power, 5 Irish Law

Rep. 500.

(*q*) Section 16; saving as to disabilities.

(*r*) Section 18, time not extended by succession of disabilities.

(*s*) Section 17, forty years the utmost limit; Doe *dem.* Corbyn *v.* Bramston, 3 Ad. & Ell. 63; 4 Nev. & Mann. 664, S. C.

mained under one or more disabilities during the whole of such forty years, or although the term of ten years from the time at which he ceased to be under any such disability, or died, has not expired ; but no part(*t*) of the United Kingdom, nor the channel islands, nor the Isle of Man, is to be deemed beyond the seas.

The regular period of limitation allowed by the Act is only twenty years from the accruer of the right, and the period of forty years is only applicable in case of the occurrence of disabilities ; the period of ten years is restricted to the person under disability, to whom the right first accrues, and in case such disability ceases, or in case of the party's death while it continues, the ten years begin to run, and after having once commenced, will not be stopped by any subsequent disability : if a party die under a continuing disability, which lasts during forty years, the right is absolutely barred on his decease, and if only *thirty-eight* years elapsed under such circumstances, the next claimant is only allowed two years, or the residue then unexpired of the period of forty years, for the institution of his suit.

25. The doctrine of non-adverse possession has been(*u*) abolished by the Statute, and where an uninterrupted possession, whatever may be its nature, has been enjoyed during twenty years without payment of rent or interest, without a subsisting lease in writing, without any written acknowledgement of title, and where no disability existed at the beginning of the period, the right of the person entitled to the ownership, and of those deriving under him is, at law, transferred to the occupier, by reason of the extinction of the rightful owner's estate : and although the rightful owner was under disability at the beginning of the limited time, if forty years be suffered to elapse, the occupier gains a lawful title against the person under such disability, and those deriving through him ; and when the Statute once begins to run, a party(*v*) cannot, by putting the estate in settlement, raise new rights for the persons claiming under the deed.

A woman who was seised in fee, having married, she and her husband continued in possession of the estate for some years, and then removed from the place upwards of forty years before the action was brought, and never afterwards returned to, or exercised any act of ownership over the property : the wife died in the year 1828, and the

(*t*) Section 19, restriction as to places beyond seas ; Hasell, *ex parte*, 3 Y. & Coll. 617, in Exch.

(*u*) Nepean *v.* Doe *dem.* Knight, 2 Mees. & W. 894 ; Jack *dem.* Montmo-

rency *v.* Walsh, 4 Irish Law Rep. 254 ; Culley *v.* Doe *dem.* Taylerson, 11 Ad. & Ell. 1008 ; 3 P. & Dav. 539.

(*v*) Stackpole *v.* Stackpole, 6 Irish Eq. Rep. 28.

1832: an ejectment was brought by the heir of the wife, the eldest son(*w*) of the marriage, and it was contended on that his father being tenant by the curtesy, the claimant's possession did not accrue until 1832: the defendant, withholding his title, insisted that the claimant was barred in consequence of the lapse of forty years after the husband and wife had discontinued the possession, or receipt of the rents of the land: and the defendant, that the terms of the seventeenth section of the Act were applicable; that one of its objects was to avoid the necessity of inquiring into facts of so ancient a date, and that the desertion of the land by the claimant's ancestor, more than forty years before the action, was a complete bar to the claimant's right to re-

claim the right of a party existing at the time of passing the Act, for five years by the fifteenth section, although the period of twenty years had previously expired; but this period of limitation having long since elapsed, it becomes unnecessary to consider the circumstances which were required to bring a party within the period.

Actions in Equity must be brought within the same period as is required for bringing actions at law, and when any land or rent shall be conveyed to a trustee, upon any express trust, the right of the *cestui-que-trust* or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover the land or rent, shall be deemed to have first accrued(*z*) at, and not before the time at which such land or rent shall have been *conveyed* to a purchaser for valuable consideration, and shall then be deemed to have accrued against such purchaser, and any person claiming through him.

It is provided that in every case of a concealed fraud, the right of any person to bring a suit in Equity for the recovery(*a*) of any land or rent, or any person through whom he claims, may have been affected by such fraud, shall be deemed to have first accrued at, and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered: however, an owner

See *Corbyn v. Bramston*, 3 Nev. & M. 664; 2 Dru. & Warr. 354.
See *Jones v. Williams*, 5 Nev. & M. 291; *Doe dem. Burgess v. Burgess*, 1 Ad. & Ell. 532.
 Section 24, suits in Equity; *Wrix-*

on v. Vize, 3 Dru. & Warr. 118.

(*z*) Section 25, express trusts; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Collard v. Hare*, 2 Russ. & M. 675.

(*a*) Section 26, concealed frauds; *Lewis v. Thomas*, 3 Hare, 26.

of lands or rents cannot maintain a suit in Equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time he made the purchase, did not know, and had no reason to believe that any such fraud had been committed: nothing in this Act is to be deemed to interfere with any rule or jurisdiction^(b) of Courts of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person, whose right to bring a suit may not be barred by virtue of the Act. The preceding sections were intended to put an end altogether to the discretion exercised by Courts of Equity, in those cases^(c) where they had before acted, in analogy to the time limited at law, as the equitable bar is incorporated in the Statute.

29. A mortgagor is to be barred at the end of twenty years from^(d) the time when the mortgagee took possession, unless, in the meantime, an acknowledgement^(e) of the title of the mortgagor, or of his right of redemption, shall have been given to him, or to some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him: and in such case, no suit to redeem the mortgage shall be brought, but, within twenty years next after the time at which the last of such acknowledgements, if more than one, was given: and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor, such acknowledgement, if given to any of such mortgagors, or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons: but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgement, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing, and the person or persons claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or interest, to take effect after, or in defeasance of his or their estate or interest, and shall not operate to give to the mortgagor or mortgagors, a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent: and where such of the mortgagees

(b) Section 27, acquiescence; Thompson v. Simpson, 1 Dru. & Warr. 489.

(c) Berrington v. Evans, 1 Yo. &

Coll. Exch. 434.

(d) Section 28, mortgages.

(e) Trulock v. Robey, 12 Simons, 402

or persons as shall have given such acknowledgement, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage: a mortgagee out of possession is only to be barred at the end of twenty years(*f*) after the last payment of any part of the principal or interest secured by his mortgage.

If a mortgagee enter into possession, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of the vendor, and to the validity of the conveyance he takes, and if the conveyance be such as only gives for his benefit the estate of a tenant for life, he must take the estate, subject to the duties which are(*g*) attached to it, in the relation which exists between the tenant for life and remainder-man, and though there has been no acknowledgement of title, time will not run against the persons in remainder during the continuance of the life-estate. Where a mortgagee out of possession was brought before the Court by supplemental bill, as a *defendant*(*h*), for the purpose of completing the title of a purchaser under the decree in the cause, it was held that he was not barred by the lapse of twenty years, as he did not maintain the character of a plaintiff suing to enforce his right.

30. No action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgement, or lien, or otherwise(*i*) charged upon, or payable out of any land or rent, at law or in Equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued, to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid: or some acknowledgement of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent; and in such case, no such action or suit, or proceeding shall be brought, but within twenty years after such payment or acknowledgement, or the last of such payments or acknowledgements, if more than one was given.

(*f*) 7 Will. IV. & 1 Vict. c. 28, Eng. and Irish; see *ante*, No. 2.

(*g*) *Raffety v. King*, 1 Keen. 601; but see *Browne v. The Bishop of Cork*, 1

Dru. & Walsh, 700.

(*h*) *Murphy v. Sterne*, 1 *Dru. & Walsh*, 236.

(*i*) Section 43, money charged on land.

The fortieth section only deals with sums of money secured(*j*) upon real property, and is not applicable to actions brought for the recovery of land; and therefore, in the case of mortgages, a suit for foreclosure being a proceeding(*k*) for the recovery of money only, or actions at law(*l*) upon the covenant usually inserted in the mortgage deed, or on the bond which accompanies it, are barred by this section, after a lapse of twenty years, unless interest be paid, or an acknowledgement be given in the meantime. Before the passing of this Act, if accounts(*m*) were kept by a mortgagee in possession on foot of his mortgage, or if a mortgagee, in his dealings with third persons, recognized the mortgage title, such acknowledgement prevented him from setting up any bar arising from length of time against the right of redemption; but the only acknowledgement suffered by this Act to be available must be given by the mortgagee in possession to the mortgagor, and must admit the mortgage to be a subsisting(*n*) security: it is not necessary to make a person an agent under this Statute, that he should have authority to act, for if a person interfere as agent on behalf of an infant entitled to the equity of redemption, it will be quite sufficient if what he has done shall be adopted by the infant after attaining his full age.

31. The statutable bar of twenty years is not confined to legacies charged upon real estate, but includes legacies(*o*) payable exclusively out of personal property: however, if an executor sever a legacy from the general personal estate, and do not pay the amount to the person entitled, the money(*p*), after such severance, assumes the character of a trust-fund, and the executor is chargeable with a breach of trust, to which the Statute does not extend.

32. Where real estates are devised in trust for payment of debts in aid of the personal estate, the Statute of Limitations does not run(*q*) in Equity, after the testator's death, against debts then subsisting, as it is not to be inferred that a person is not entitled to a debt because he does(*r*) not go to law, when he has a trustee to pay him; but a testamentary direction for payment of debts is merely inoperative so far

(*j*) *Henry v. Smith*, 2 Dru. & Warr. 381.

(*k*) *Dearman v. Wyche*, 9 Simons, 570; and see *Wrixon v. Vize*, 3 Dru. & Warr. 120.

(*l*) *Doe dem. Jones v. Williams*, 5 Ad. & Ell. 296, by Littledale, J.; 6 Nev. & M. 818.

(*m*) *Hodle v. Healey*, 6 Madd. 181; *Hansard v. Hardy*, 18 Vesey, 455.

(*n*) *Trulock v. Robey*, 12 Sim. 402.

(*o*) *Sheppard v. Duke*, 9 Simons, 567;

Henry v. Smith, 2 Dru. & Warr. 391; 4 Irish Eq. Rep. 502.

(*p*) *Phillipo v. Munnings*, 2 My. & Cr. 309.

(*q*) *Crallan v. Oulton*, 3 Beav. 1; *Ward v. Arch*, 12 Sim. 472; *Dillon v. Cruise*, 3 Irish Eq. Rep. 70; *Kelly v. Kelly*, 6 Law Rec. 222; *Cockburn v. Wright*, 6 Irish Eq. Rep. 1.

(*r*) *Hughes v. Wynne*, Turn. & Russ. 307.

as the personal(*s*) estate is concerned, and does not stop the running of the Statute. Where an executor, who received assets sufficient to pay a legacy, died leaving it unpaid, and by his will charged his real estate with his debts; the right to sue for the legacy out of the personal estate of the original testator becoming barred by lapse of time, it was ruled(*t*), that the demand could not be revived by the charge of debts: a constructive trust, or a trust which is only made out by evidence, is barred by length of time, which begins to run(*u*) from the execution of a conveyance, or entry by the trustee: but where a party holds upon express trusts, and takes possession in that character, he is bound to execute the trusts, though more than twenty years have elapsed.

Cases of charity were not included in any of the early Statutes of Limitation, and were not bound by any equitable analogy to those Acts, and do not seem(*v*) to have been comprised within the terms of the late Statute.

The appointment of a receiver by a Court of Equity over the estate of an infant(*w*) does not prevent the bar of the Statute from running against an encumbrancer on that estate, who is no party to the order: no such exception is to be found in the Statute, and its introduction would have the mischievous effect of placing infants in a worse situation, because they were taken under the protection of the Court, than they otherwise would be: but though the appointment of a receiver does not prevent the statutory bar from operating against a stranger, yet the interposition of a receiver, at least in a Court of Equity(*x*), prevents time from running *in favour* of a stranger to the suit: the possession of the Court by its receiver is the possession of the suitor, and the time cannot run against a person in possession.

A Court of Equity will not permit a suitor to be evicted at law, who had an equitable right to sue for the land in dispute, and filed his bill within the time allowed by the Statute, and duly pursued his remedy: before the passing of the recent Act, it was held that a bill led by a creditor on behalf of himself and others, conferred(*y*) an inchoate interest in the suit on any creditor who had a debt then subsisting, and not barred by length of time, which would prevent him

(*s*) *Scott v. Jones*, 4 Cl. & Finn. 32; *Evans v. Tweedy*, 1 Beav. 55; *Reake v. Cranefield*, 3 My. & Cr. 499.

(*t*) *Piggott v. Jefferson*, 12 Sim. 26.

(*u*) *Salter v. Cavanagh*, 1 Dru. & Valsh, 668; *Thompson v. Simpson*, 1 Dru. & Warr. 489.

(*v*) *Incorporated Society v. Richards*, Dru. & Warr. 258; 4 Irish Eq. Rep.

196.

(*w*) *Harrison v. Duignan*, 2 Dru. & Warr. 295; *Kine v. Dignam*, 4 Irish Eq. Rep. 562; *Anon.* 2 Atk. 15.

(*x*) *Wrixon v. Vize*, 3 Dru. & Warr. 123.

(*y*) *Sterndale v. Hankinson*, 1 Sim. 393.

from being excluded, though the decree was not obtained within the statutable limit; but as bills filed by creditors are not excepted out of the operation of the Statute, the English Exchequer refused(*z*) to permit a judgement creditor to prove his debt under the decree, where twenty years had elapsed before making the application, though the judgement was in full force when the decree was pronounced. Where an original bill for a legacy was filed in December, 1833, on which writs of *subpœna* were issued, but not served(*a*), and no further proceeding was taken until December, 1841, when an amended bill was filed, the suit was held to have been pending from the exhibiting of the original bill within the meaning of the fortieth section of the Act, so as to prevent any bar from the lapse of time. If a creditor under a decree in an administration suit, seeks to prove a debt barred by lapse of time, and the executors refuse to interfere, any person(*b*) interested in the fund may set up the bar of the Statute.

When the remedy for recovery of the possession of land is barred by force of the late Act, the right and title of the real owner(*c*) are extinguished, and are, in effect, transferred to the person whose possession creates the bar. A testator by his will made in March, 1776, devised the residue of his estate to his six younger children, and afterwards purchased the freehold interest in question: the younger children on their father's death(*d*) possessed themselves of the freehold, as being part of the residue, and enjoyed the property for more than twenty years: the after-purchased estate being sold under a decree of the Court of Chancery, to which the younger children were parties, the purchaser objected to the title, because this estate did not pass by the will, and the heir of the testator was not a party in the cause: Sir Edward Sugden, upon appeal, overruled the objection, and decided that after the time limited by the Statute had elapsed, the title of the party out of possession was not only extinguished, but the party against whom such title might have been set up, acquired the legal fee by Act of Parliament, which he is competent to convey to a purchaser.

(*z*) *Berrington v. Evans*, 1 Yo. & Coll. 434, in the Exch.; but see *Murphy v. Sterne*, 6 Dru. & Walsh, 198; *O'Kelly v. Bodkin*, 3 Irish Eq. Rep. 392, by Pennefather, Baron; *Brown v. Lynch*, 4 Irish Eq. Rep. 319.

(*a*) *Boyd v. Higginson*, 5 Irish Eq. Rep. 97; *Morris v. Ellis*, 7 Jurist, 413; *Coppin v. Gray*, 1 Yo. & Coll. in Chan. 205.

(*b*) *Shewen v. Vanderhorst*, 1 Russ. &

M. 347; Les creanciers, ou toute autre personne ayant interet à ce que la prescription soit acquise, peuvent l'opposer, encore que le debiteur, ou proprietaire y renonce.—Code Civil, No. 2235.

(*c*) *Incorporated Society v. Richards*, 1 Dru. & Warr. 289; *Bampton v. Birchall*, 5 Beav. 76.

(*d*) *Scott v. Nixon*, 6 Irish Eq. Rep. 8; 3 Dru. & Warr.

It was supposed that by the operation of this Act, it was not necessary that a title should be carried back to a period of sixty years, but Lord Lyndhurst has decided(e) that the Statute does not introduce any new rule in this respect, and that the security of titles would be affected by shortening the period.

33. It is enacted by the forty second section(f), that no arrears of rent or of interest in respect of any sum of money charged upon, or payable out of any land or rent, or in respect of any legacy, or any damages in respect of any such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgement of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or by his agent: but that where(g) any prior mortgagee or other encumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to such subsequent mortgage or encumbrance, may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or encumbrancer was in such possession or receipt, although such time may have exceeded the term of six years. The Irish Statute, 3 & 4 Vict. c. 105(h), enacts, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, shall be commenced and sued within ten years after the end of the then session(i) of Parliament, or within twenty years after the cause of such actions or suits, and not after.

34. The preceding clause of the English Statute(j), 3 & 4 Will. IV. c. 42, was not extended to Ireland until the passing of the Irish Statute, 3 & 4 Vict. c. 105, in August, 1840, and during the interval, it was(k) frequently decided by the Irish Courts, that a landlord was not entitled to recover an arrear of rent reserved by indenture of lease for

(e) *Cooper v. Emery*, 1 Phill. 388.

(f) 3 & 4 Will. IV. c. 27, s. 42; arrears of rent, or of interest charged on land.

(g) Possession of prior encumbrancer, *Brought v. Jones*, 2 Irish Eq. Rep. 303.

(h) 3 & 4 Vict. c. 105, s. 32, Irish; 3 & 4 Will. IV. c. 42, s. 3, English.

(i) 26th January, 1841.

(j) 3 & 4 Will. IV. c. 42, English.

(k) *M'Kiernan v. Halliday*, 4 Law Rec. 58, 2nd ser.; *Bruen v. Nowlan*, 1 Jebb & S. 346, note; *Wilson v. Jackson*, 1 Jebb & S. 639; 2 Irish Law Rep. 1; *Armstrong v. Lloyd*, 2 Irish Law Rep. 70; 3 Irish Law Rep. 57.

any period exceeding six years. An opinion was intimated by Tindal, C. J., that the arrears of rent mentioned in the forty-second section, had no relation(*l*) to conventional rents reserved by lease, and it has accordingly been settled, that the rights of the reversioner, which are to be enforced on the expiration of the lease, being preserved, it followed that the rights which exist(*m*) as incidents to the reversion, during the continuance of the demise, cannot be defeated, and that rent-service, or conventional rents, did not come within the Statute: it was also ruled, that even if rents reserved by lease were included in the 3 & 4 Will. IV. c. 27, such provision being incompatible with, was repealed by the subsequent Statute(*n*).

Until the expiration of ten years after the session(*o*) of Parliament in which the Statute 3 & 4 Vict. c. 105, was enacted, an arrear of rent reserved by indenture may be recovered in an action of debt, or covenant for any number of years, but after that period shall have elapsed, an arrear of rent reserved by deed will not be recoverable for any time exceeding twenty years.

35. By the forty-second section of this Statute, no interest upon money charged upon land could be recovered in any action or suit for more than six years, although the payment of such interest was secured both by bond and covenant: it was not that land alone could not be charged, leaving the personal remedies against the debtor open; but that the fact of the land being charged was, according to the letter of the Act, a bar to the recovery of interest even upon the personal remedies for a longer period than six years: and Sir James Wigram, V. C., observes(*p*), it never could have been intended, that because a creditor had security upon land, as well as by bond or covenant, his personal remedies against his debtor should, on that account, be impaired, and accordingly, by the 3 & 4 Will. IV. c. 42(*q*), passed at a later period of the same session of Parliament, the right of a creditor to bring an action upon the bond or covenant, was extended to, or declared to exist for twenty years, notwithstanding the forty-second section of the former Act.

A mortgage is a charge upon land within the meaning of the forty-second section; but where a debt is secured by the bond or covenant(*r*) of the debtor, as well as by the mortgage of his lands, the mortgagee is

(*l*) *Paget v. Foley*, 2 Bing. N. C. 679; 3 Scott, 120; *Paddon v. Bartlett*, 3 Ad. & Ell. 884; 5 Nev. & M. 383.

(*m*) *Grant v. Ellis*, 9 Mees. & W. 126; *Daly v. Ld. Bloomfield*, 5 Irish Law Rep. 76.

(*n*) 3 & 4 Will. IV. c. 42, English; 3

& 4 Vict. c. 105, Irish.

(*o*) After the 26th of January, 1851.

(*p*) *Du Vigier v. Lee*, 2 Hare, 326.

(*q*) 3 & 4 Will. IV. c. 42, English.

(*r*) *Du Vigier v. Lee*, 2 Hare, 326; but see *Hughes v. Kelly*, 5 Irish Eq. Rep. 286; 3 Dru. & Warr.

entitled, under the 3 & 4 Vict. c. 105, to carry back the interest account, in a foreclosure suit, for a period of twenty years, and the relative rights of mortgagee and mortgagor are the same in a bill to redeem as on a bill to foreclose, and a larger sum cannot be decreed to the mortgagee in one suit than in the other. A rent-charge secured by covenant(s) falls within the forty-second section; but it also comes within the thirty-second section of the 3 & 4 Vict. c. 105, by which the period of limitation for its recovery by action of covenant is enlarged to twenty years. However, where money is charged upon, or payable out of land, without any covenant(t), or engagement for payment, the case depends on the first act, and no more than six years of such rent or interest can be recovered.

Sir Edward Sugden holds that the Act, 3 & 4 Vict. c. 105, cannot be considered as including the case(u) of a charge upon land with a covenant for its payment, and as enlarging the remedy which previously existed for recovering the interest upon it; but that the right to interest in such a case depends entirely upon the forty-second section of the former Act, by which the interest is limited to six years, and that the legislature never intended that the earlier Act should be repealed by the later, but that both Statutes should act, and be construed together; and accordingly, where lands were conveyed subject to the payment of a sum of money, which the grantee covenanted to discharge, he decided, that not more than six years' interest upon the charge was recoverable out of the land.

Debts secured by judgement are deemed sums of money charged upon and payable out of land, within the meaning of the 42nd section of the original Act, and only six years' arrear(v) of interest is allowed to be recovered on such demands, either against the real estate or personal property of the debtor; and it appears that the interest on judgements given by the twenty-sixth section(w) of the 3 & 4 Vict. c. 105, is subject to the limitation of the former Statute.

(s) *Strachan v. Thomas*, 12 Ad. & Ell. 556; 4 P. & Dav. 229.

(t) *Hodges v. Croydon Canal Co.*, 3 Beav. 86; *Burne v. Robinson*, 1 Dru. & Walsh, 688; *Foley v. Dumas, Smythe*, '8.

(u) *Hughes v. Kelly*, 5 Irish Eq. Rep. 286; 3 Dru. & Warr.

(v) *Henry v. Smith*, 2 Dru. & Warr. 381; 4 Irish Eq. Rep. 502; *O'Kelly v. Bodkin*, 3 Irish Eq. Rep. 390; overruling *Kealy v. Bodkin*, Sausse & Sc. 211.

(w) 3 & 4 Vict. c. 105, s. 26, Irish; 1 & 2 Vict. c. 110, s. 17, English.



APPENDIX.

No. I.

very curious Irish Statute, 11 Elizabeth, Sess. 3, c. 1, for the attaintment of the name of O'Neile, and the extinguishment of the name of O'Neile, the ancient titles of the Kings of England to the land of Ireland, from the most ancient chronicles of this realm, in the Latin, and Irish tongues. The first title is, that before the coming of the Saxons into this land, they were dwelling in a province of Spain called Gascony, whereof Bayonne was the chief city, and that at the Irishmen's coming into Ireland one King Gurmonde, son of the noble King Belan, King of Britain, which is now called England, was Lord of Bayonne, as his successors were, to the time of King Henry the Second, first of this realm, and, therefore, Irishmen should be the people of the land, and Ireland his land.

No. II.

At the reign of Edward the Second, there were five principal septs of the Irish authorized to have the benefit of the law of England, which appears in the following records :

1217. d II.—Frater Philippus de Monsterworth, et Frater Richardus de Lanthony juxta Glocester, Richardus Fox, et Willielmus de Duleek attachiati fuerunt ad respondendum Willielmo O'Kelly de Duleek cum dominus Rex cepisset in protectionem suam specialem prælium Willielmum O'Kelly, homines, terras, res, redditus et omnes possessiones inhibens omnibus et singulis, ne iis inferret, vel inferri permitteret, &c., iidem Philippus, Richardus, Richardus, et Gulielmus, in prælium Willielmum O'Kelly, apud Duleek, vi et armis insultum fecerunt, ac eum forstallaverunt, ceperunt, et imprisonaverunt, et alia enormia ei intulerunt damnum, &c., et contra protectionem domini regis, &c.

1218. Ictus Philippus, Richardus, Richardus, et Gulielmus veniunt et accusant Willielmum et injuriam quando, &c., et dicunt quod non tenentur prælium ad hoc breve respondere, quia dicunt quod prædictus Willielmus est Hibernicus, et non de sanguine, aut progenie eorum, qui sunt de Anglica quoque ad brevia portanda, qui sunt, O'Neil de Ultonia

O'Conoghor de Connaciâ, O'Brien de Thomoniâ, O'Melaglin de Midiâ, et Mac Murrough de Lageniâ, et petunt judicium, &c.

Et prædictus Willielmus O'Kelly dicit quod reverâ ipse est Hibernicus, sed de progenie de O'Neil de Ultoniâ habens ortum suum de sexû masculino ejusdem progeniei, et petit instanter judicium.

Et prædictus Philippus, &c., dicunt quod Willielmus O'Kelly admitti non debet ad dicendum quod sit de prædictâ progenie de O'Neil, quia si esset de progenie illâ, hoc appareret in ejus cognomine, qui tunc diceretur, Willielmus O'Neil, et non Willielmus O'Kelly, et unde dicunt quod ipse non est de progenie de O'Neil, &c. Ideo inquiratur per patriam, &c. It appears that the plaintiff, O'Kelly, made default.

By another record, 28 Edward III., between Simon Neal and William Newlagh, it appears that issue was joined upon the fact, whether the plaintiff was "de quinque sanguinibus," and a verdict was found for the plaintiff.—See the case of Tanistry, in the Reports of Sir John Davies, fo. 103.

No. III.

Charter of Denization granted in the Thirteenth Year of the Reign of Edward the First, A. D. 1284.

Edwardus Dei gratiâ, &c., omnibus Ballivis, &c., salutem : Sciatis quod nos volentes Willielmum O'Bolgir Capellanum de Hibernicâ natione existentem, favore prosequi gratioso, de gratiâ nostra speciali, &c. Concessimus eidem Willielmo quod ipse liberi sit statûs, et liberæ conditionis, et ab omni servitute Hibernicâ liber et quietus, et quod ipse legibus anglicanis in omnibus et per omnia uti possit et gaudere, eodem modo, quo homines Anglici infra dictam terram eas habent, et iis gaudent, et utuntur, quodque ipse respondeat, et respondeatur in quibuscumque curiis nostris : ac omnimodas terras, tementa, redditus et servitia perquirere possit sibi et hæredibus suis in perpetuum, &c.

Charter granted in the Sixth Year of Richard the Second, A. D. 1382.

Rex omnibus ad quos, &c., salutem : Sciatis quod de assensû consilii nostri concessimus pro nobis et hæredibus nostris, ad supplicationem Cornelii de Clone de Hiberniâ dicto "of Fynatha" militis Hibernici, et pro suo bono gestû apud nos et pro bono servitio quod nobis impendit tempore præterito, tam prædicto Cornelio qui est de natione Hibernicâ, quâm omnibus aliis de prædictâ natione qui sunt et erunt ad obedientiam nostram et de sanguine ipsius Cornelii existunt et gerunt cognomen de "of Fynatha" quod ipsi pro tempore, quo sic obedientes nobis vel hæredibus nostris existent, uti et gaudere possint omnimodis hæreditatibus, beneficiis, et libertatibus in terrâ nostrâ Hiberniæ prædictâ, prout ligei nostri Anglicani et obedientes nostri ibidem gaudent et utuntur.—See *Prynne's Animadversions*, fo. 258.

No. IV.

agriculturæ non student, majorque pars victûs eorum in lacte, caseo, carne constitit : neque quisquam agri modum certum aut fines habet proprios ; sed stratus ac principes in annos singulos gentibus, cognationibusque hominibus, qui unâ coierint, quantum, et quo loco visum est, agri attribuunt, atque post alio transire cogunt.—*Julius Cæsar de Bello Gallico*, liber sextus, 22.

Agri pro numero cultorum ab universis per vices occupantur, quos inter secundum dignationem partiuntur : facilitatem partiendi camporum spatiastant, arva per annos mutant, et superest ager.—*Taciti Germania*, cap.

No. V.

By an inquisition taken at Mallow, on the twenty-fifth day of October, 1781, before the vice-president and judges of the province of Munster, by virtue of a commission from the Lord Deputy and Council, it was found, amongst other things, that Conoghor O'Callaghan, otherwise "The O'Callaghan," was and is seised of several large territories in the inquisition recited, as demesne as lord and chieftain of Poble O'Callaghan, by the Irish custom, time out of mind used, and that as O'Callaghan aforesaid is lord of the said country, so there is a Tanist by the custom of the said country, who is the son of O'Callaghan, and that the said Teige is seised as Tanist by the said custom of several plowlands therein mentioned : and further, that every kinsman of the O'Callaghan had a parcel of land to live upon, and yet that no law was passed thereby, but that the O'Callaghan for the time being, by custom, time out of mind, may remove the said kinsmen to other lands : and further, that other persons, named in the said inquisition, were seised of several plowlands according to the said custom, subject nevertheless to certain seignories and duties payable to the O'Callaghan, and that such persons were removable by him to other lands at his pleasure.

No. VI.

In the second volume of the "*Rotuli Curiae Regis*," edited by Sir Francis Brompton, and printed under the directions of the Commissioners of the Public Records, it is said, that the "*Curia Regis Angliæ*" had full jurisdiction over all pleas, and that this fact appears from an appeal preferred by Willielmus de Warenne against Warinus de London and others, in the first year of King Richard I., A. D. 1199. There had been a feud between the parties, and Williel-

mus Brunus came before the justiciary, Peter Pipard, in the county-court of Dublin, and prayed the king's peace, which his opponents pledged accordingly. Some time afterwards Willielmus Brunus repaired to Dublin Castle, in obedience to the king's writ, and as he was returning home, accompanied by the appellants, they were encountered by the appellees, together with an unknown individual, armed with a battle-axe, and by the latter Willielmus Brunus was slain, and he dropped dead in the fosse of Dublin Castle: the hue and cry was raised, and the battle-axe man escaped by the help of Warinus de London. The appellants then severally challenge the appellees: Robert Keinel, the vassal and kinsman of the deceased, proffers battle against Warinus de London, for the battle-axe man slew his lord at the bidding of Warinus, and that the latter also procured his escape feloniously, the parties being in the peace of the "lord of the land," and against the peace which he had pledged. Rogerus Brunus, the vassal and nephew of the deceased, and Philippus de Livet, and Henricus de Frideby, his kinsmen, in like manner and in their turns, severally challenge the remaining appellees, who joined in directing and encouraging the malefactor to do the deed. Warinus denies the whole as a maimed man, his leg being broken, which mayhem, the knights, sent to inspect the same, attest: all the others offer to defend themselves as the Court shall adjudge, and they proffer sixty marks to have an inquest whether they ever pledged the peace in manner before-mentioned: the offer is not accepted, and judgement is given that Warinus shall defend himself by the fire ordeal, and the others by duel, and that they shall all make their laws in the *quinzaine* of the morrow of St. George, before the king, and wherever he shall be, whether in England or beyond the seas.

Placita de termino Paschæ et de termino Sanctæ Trinitatis anno regni Regis Johannis Primo.

Divelin, Ss.—Robertus Keinel homo et parens Willielmi Bruni, Rogerus Brunus, nepos et homo ejusdem, Philippus de Livet, Henricus de Frideby parentes ejus, dicunt quodcum aliquando contencio et malivolencia esset inter Willielmum Brunum, et inter Warinum de London et Eliam filium Philippi, et Richardum filium Gilemichal, et Thomam Norensem et Robertum de Winton qui obiit. Idem Willielmus Brunus venit in Comitatu de Divelin, et petiit pacem regis, ita quod coram justiciario illius terræ, scilicet, Petro Pipardo, prædicti, eidem Willielmo pacem vadiaverunt. Contigit autem postea quod idem Willielmus per præceptum justiciarii venit ad castellum de Divelin, et cum redire vellet, et ipse esset super pontem, et prædicti Robertus, et Rogerus et Philippus et Henricus cum eo, viderunt ipsi prædictos Warinum, Eliam, Richardum, Thomam, et Robertum, et quendam alium, quem nusquam prius viderant nec postea, qui tenuit unam hachiam, et cum ipsi vellent opponere se prædictis, et domino suo; venit ipse qui tenuit hachiam et per præceptum prædictorum percussit ipse Willielmum Brunum, ita quod ipse

lit in fossâ castelli et tertio die post obiit : et cum duo de prædictis de-
lissent in fossâ ut domino suo auxiliarentur, duo alii levaverunt clamo-
et huthes et secuti fuerunt illos malefactores, quousque prædictus Wari-
le London recepit ipsum, qui dominum suum interfecit, et per portam
dam quam ipse custodiebat, et unam habuit clavem, fecit exire, ita quod
potuerunt eum assequi. Dicunt etiam quod ad clamorem inde levatam
: justiciarius terræ, et Radulphus Morin qui hominem bene cognovit, et
i alii, qui ipsum Willielmum viderunt ita percussum : et quod bajulans
iam ita per præceptum Warini, dominum suum percussit et ipsum postea
rtam, quam habuit in custodiâ, recepit nequiter, et in pace domini terræ,
ntra pacem, quam vadiaverat, offert ipse probare versus eum sicut curia
ideraverit “ut de visû et auditû.” Et Rogerus Brunus offert probare
iter versus Eliam : Philippus versus Richardum : Henricus versus Tho-
: quod prædictus malefactor ita dominum suum interfecit per præcep-
eorum ut de visû et auditu suo : Et Warinus venit et defendit totum de
o in verbum, sicut homo maheimatus de gambâ sua, quæ fracta fuit,
: milites missi ad videndum eum, hoc testantur : et alii similiter totum
adunt sicut curia consideraverit et offerunt sexaginta marcas pro ha-
â inquisitione, si unquam vadiaverint pacem sicut dictam.

Consideratum quod Warinus defendat se iudicio ferri : vadiavit legem :
li appellati defendant se per duellum : Elias vadiavit duellum : Richar-
similiter. Dies datus faciendi leges suas a Crastino sancti Georgii in
decim dies coram domino rege ubicunque fuerit in Angliâ sive ultra
.

The feud between these families seems to have continued for a long period,
an entry is found on the Roll of the thirty-first year of Edward the First,
“Rex perdonavit Stephanum le Brun juniorem sectam pacis pro morte
næ filii Warini.” The “secta pacis,” or suit of the king’s peace, means
prosecution for breach of the king’s peace by treason, felony, trespass, &c.
Warins or Fitz-Warins were a powerful family in the reign of King John,
obtained large possessions in Ireland.—*L’Histoire de Foulques Fitz-
-in, publiee par Francisque Michel.* Paris, 1840.

No. VII.

Mr. Hammond, in his *Law of Nisi Prius*, page 368, observes, that the ce-
mony of fealty, strictly speaking, could not be required at this day from any
at whatever; but no authority is cited for this position. The practice of
giving fealty has fallen into disuse in Ireland. The latest instance of it I
found, is mentioned in the case of *Edgworth v. Edgworth*, 2 Brown’s
Cases, 27, and is stated to have occurred in the year 1759, upon the oc-
casion of a disputed title to lands in the counties of Meath and Kildare.

No. VIII.

Secret feoffments, made for the purpose of avoiding forfeitures, appear to have been resorted to in Ireland at an early period. By the Irish Statute, 3 Edw. II. c. 4, it is enacted, that if any man enfeoff another of his land, with intent to enter into rebellion, or to commit any other felony, and, after the felony committed, again to have his land, that such manner of feoffment shall be held for none; but that, presently after the felony committed, the king shall have the year and the waste of the same tenements; and afterwards the chief lord shall have the same as his escheat, so that the truth of the matter, and the manner of the feoffment, be first inquired by writ out of Chancery.

And see the Statute of Kilkenny, 40 Edw. III. c. 22, printed for the Irish Archæological Society.

No. IX.

Leibnitz has observed of the civil law: "*Dixi sæpius post scripta geometrarum nihil exstare quod vi ac subtilitate cum romanorum juris-consultorum scriptis comparari possit: tantum nervi inest, tantum profunditatis.*"—*Opera*, vol. iv. fo. 267. And afterwards in his letters: "*Ego digestorum opus, vel potius auctorum, unde excerpta sunt, labores admiror, nec quidquam vidi, sive rationum acumen, sive dicendi nervos spectes, quod magis accedat ad mathematicorum laudem.*"

No. X.

PERRET AND CURTICE *v.* CABLE(*a*).

George Kirkham being seised in fee, by indenture dated the 23rd of July, 1573, demised certain premises in the county of Devon to John Efford, for his life; and the lessor, by indenture dated the 10th of July, 1574, covenanted to levy a fine of the reversion to George Carye, and others, to the use of him George Kirkham, in tail male, with remainder to the use of his brother William, in tail male, remainder to his brother Richard, in tail male, and to the further use and intent, that if the settlor, George Kirkham, should happen to die without male issue, that then it should be lawful for his brother William, during his life, and after his death for any of the heirs male of his body, to demise, grant, and farm-let any part or parcel of the premises, to any person or persons, for the term of three lives, or of twenty-one years, or

(*a*) *Winch's Entries*, 945; *Godb.* 195, plac. 281; 2 *Ro. Abr.* 261 *Powers*, A. pl. 9.

in possession, or reversion, or for the term of eighty years, determinable three lives, in possession or reversion, upon which the ancient and accustomed rent, or more, should be reserved, to continue and be payable during continuance of such several leases or grants to the parties entitled by such indenture to the remainder or reversion of the premises so to be demised, or granted, with a sufficient clause of distress to be contained in and upon every such demise or grant to the parties entitled by virtue of such indenture: and that the demise so to be made by the said William Kirkham, or any of the heirs male of his body, should stand, be, and continue good and effectual, and should have continuance according to the tenor and effect of such demises or grants, at and under the reservations, rents, conditions, and agreements reserved, comprised, and specified in and upon the said several demises, or grants, and not otherwise: and that then and so often as any such demise or grant should be made by the said William Kirkham, or any of his heirs male, the said releasees to uses, and every of them, and their heirs, should stand and be seised of and in such of the premises, which should be so demised or granted by the said William Kirkham, or by any of his heirs male, to the use of such several persons, to whom the said premises, or any part, should be so demised or granted, for and during such terms, interest, or estate, and in such manner and form as should be demised by such grants or demises. The fine was levied to the uses of the preceding deed, and George Kirkham being died without issue male, by indenture, dated the 7th of March, 1582, made between William Kirkham, of the one part, and Anne, the wife of Richard Efford, and Johanna and Philippa, their daughters, of the other part, the said William Kirkham granted to Anne, Johanna, and Philippa, the said reversion for the term of eighty years, thence next ensuing, provided they, any one of them, should so long live: yielding and paying yearly, during the said term, to the said William Kirkham, and the heirs male of his body, in default of such issue to Richard Kirkham, and the heirs male of his body, and for default of such issue, to the right heirs of George Kirkham, three pence, lawful money of England: and also yielding and paying her and their best beast, in the name of a farliffe(a), or heriot, on the death of the tenant or tenants of the said premises, and all other duties and services before then used, or accustomed to be paid for the said premises, if any there were: the said yearly rent of three pounds to be paid yearly, at the four most usual feasts of the year, that is to say, Michaelmas, Christmas, Lady-day, and St. John's Day, in equal portions, and the said other duties and services, if any there should be paid or rendered in such manner and form as before then were usually and accustomedly made, and not otherwise: and if it should happen that the said yearly rent, or any part thereof, or any other the services or duties re-

(a) The word "farliffe" means, the good, and "heriot" the best beast. *dem. Bligh v. Colman*, 1 Bing. 28. See recurs in the power referred to in *Doe* "farley," in Howell's Interpreter.

served by the said indenture should be in arrear, in part or in the whole, after any of the periods on which the same ought to be paid, that then and thenceforth it should be lawful for the said Wiliam Kirkham, and the heirs male of his body, and in default of such issue, for the said Richard Kirkham, and the heirs male of his body, into all and singular the premises, and every part thereof to enter and distrain, and the distress there so taken to lead, drive, carry away, and the same to impound and detain as long as the said rent and arrears should remain unpaid and unsatisfied. John Efford, the first lessee, immediately attorned to Anne, Johanna, and Philippa. William Kirkham died without issue, and Richard Kirkham died leaving Sir William Kirkham, knight, his eldest son and heir, who thereupon became seised of an estate in tail male in the reversion of the premises. Anne Efford died, and William Perret married Johanna, and John Curtice married Philippa : on the 4th of May, 1606, John Efford died, and upon his decease the defendant, Cable, as bailiff of Sir William Kirkham, seized two cows on the premises as a distress damage-feasant : Perret and Curtice replevied, and having declared, the defendant Cable made cognizance, stating the seisin in fee of George Kirkham, the demise to John Efford, his death, and then deduced the title in the reversion to Sir William Kirkham : Perret and Curtice pleaded, admitting the seisin in fee of George Kirkham, the lease to John Efford for his life, and set out the deed leading the uses of the fine, and the leasing power thereby given in possession or reversion ; the fine levied ; the lease to Anne, Johanna, and Philippa ; the deaths of George Kirkham, William and Richard Kirkham, and of Anne Efford and John Efford. To this plea, the defendant Cable demurred, raising the question, whether the concurrent lease by William Kirkham was a valid execution of the power.

The Court held, that though the words of the power were to lease *in reversion*, yet that a lease *of* the reversion was valid : and as a lease for eighty years determinable on three lives, commencing on the decease of John Efford the first lessee, would have been within the precise terms of the power, that a lease for eighty years, commencing *in præsentî*, determinable in like manner, was less than the proviso would have warranted.

It was probably contended in this case, that the power required, an immediate and available clause of distress should be inserted in the lease, and that the clause of distress reserved by the lease was unavailing during the continuance of the prior demise, after the attornment of the first lessee, to which the observation made by Sir Edward Coke, C. J., seems applicable, “ that an action of debt for the rent would lie against the new lessees.” With respect to the supposed advantage which the remainder-man would derive from the term being made to commence *in præsentî*, instead of on the expiration of the prior lease, it depended solely on the remote contingency of one of the two surviving *cestuique vies* outliving the term of eighty years.

No. XI.

The term "copyhold" is sometimes introduced into Irish Statutes, which are transcribed from Acts of the English Parliament. By the Irish Act for the Abolition of Feodal Tenures, all holdings in frankalmoigne, and by copy of court roll, are excepted. Sullivan in his excellent^(a) lectures on the feudal law, asserts there were no copyhold tenures in Ireland; but it is stated in Gabbett's Digest of the Statute Law^(b), that the copyhold tenure exists in the manor of Kilmoon, or Primatestown, in the county of Meath. All lands in Ireland, which were considered profitable in the time of Charles the Second, are holden from the Crown by letters patent, except some parts of the ancient possessions of the Church. The primate is lord of the manor of Kilmoon, in right of his see, and there are customary holdings of land in the manor which assume the character of copyholds by the tenure of the verge, and courts are held for the admittance of the customary tenants: this manor, as well as similar holdings in other parts of Ireland, are probably remains of the old termon lands, formerly holden by a sort of hereditary tenure of the bishop of the diocese, yielding seignorial dues and fines to the bishop, and subject to the service of keeping the church in repair.—See *the Letter from Sir John Davies to the Earl of Salisbury, concerning the Corbes and Herenachs of Ireland*; and also *Ware's Antiquities by Harris*, fo. 233.

No. XII.

Plowland.—Carva seu carucata terræ est ea portio, quæ ad unius aratri operam designatur: exoletæ jam pené inter nostrates sunt hæ voces: florent autem apud Hibernicos, saltem, mihi notiores, occiduos. Connaciam enim in comitatus, hæ in Baronias, easdemque in carucatas dispescunt, plus minus 120 acras continentes.—Qui numerus nostris etiam majoribus potior aliquando fuisse videtur et Domesdeio frequentior: varius tamen prout solum levius fuerat, aut operosius.—*Spelm. Gloss.* 126, *in verbo*. Ed. 1687.

Hida, portio quæ vel ad alimoniam unius familiæ vel ad annum pensum minus aratri, designatur: idem ac carucata terræ.—*Spelm. Gloss. in verbo*.

And this shall be the quantity which a footman shall have, viz., a plowland, which contains 120 Irish acres, but you will understand it better by English measure: a plowland shall contain 255 acres of arable land: then there cannot lie in any country almost, especially so full of bottoms as that soil is, so much arable land together, but there will be also intermingled therewith, slops, slips, and bottoms fit for pasture and meadowing, and commo-

(a) Sullivan's Lectures, 244–263, 4to. 1772.

(b) 1 Gabb. Dig. 445.

dious to be annexed to the same plowland, so that the whole may amount to 300 acres at the least: a horseman shall have double, viz., 600 acres at the least: an Irish acre is two English acres and a half-quarter.

The offer and order given forth by Sir Thomas Smyth, knight, and Thos. Smyth, his son, unto such as are willing to accompany Thos. Smyth, the son, in his voyage for the inhabiting of some parts of the North of Ireland.

In ejectment for ten hydes of land, late the possessions of the prior of Peterborough: by the solicitor(*a*), a hyde of land is the same as a carucate, which is as much as a plough, which usually is intended to have six horses (the most may manure in a year within this county of Northampton) is between 100 and 120 acres at Erkingborough, which is about five yard-land, each yard-land being twenty-four acres of arable and of ley, and sixteen of meadow and pasture.—*Wright* dem. *Pocklington v. Sherrard*, 1 Keble's Rep. 877.

No. XIII.

Year Book, 38 Edm. III., fo. 8.

In a writ of debt the plaintiff put forward an indenture, by which he had demised to the defendant a manor for a term of years, and in the same deed the defendant did grant to be bound to the plaintiff in £20, in case certain conditions comprised in the same indenture were not performed; and the plaintiff sued out a writ of debt for the £20.

Belknap(b).—Sir, you perceive it is proved by the deed, that the manor was leased to the defendant and to one R, who was also a party to the condition, that R and the defendant should pay the £20, if the conditions were broken, which R is alive, and not named in the writ: (prays) judgement of the writ.

Cavendish(c).—We say that R never put his seal to the deed, and, therefore, is no party to the deed; so the writ is good(*d*) against the defendant alone.

Thorpe(e).—If land be leased to two for a term of years, and one puts his seal, and the other agrees to the lease, and enters and takes the profits, he shall be liable to the rent, though he has not put his seal to the deed.

Finchden(f).—Sir, I acknowledge that; for his money makes him party

(*a*) Sir Heneage Finch, Sol. Gen.

(*b*) Belknap, then King's Serjeant at Law.

(*c*) Cavendish, appointed Chief Justice of the King's Bench in the following year.

(*d*) (Not good) in the original.

(*e*) Thorpe, Chief Justice of Common Pleas.

(*f*) Finchden, appointed one of the Justices of the Common Pleas in the ensuing year.

the lease, and also (liable) to pay the rent; but if there be a condition comprised in the deed, which is not parcel of the lease, (it is) in gross as to him, and if he does not put his seal to the deed, though he be party to the lease, he is not party to the condition: however, the writ was abated.

Lord *Coke*, after stating (a) Finchden's argument, adds that, "inasmuch as R had agreed to the lease, which was made by indenture, he was chargeable by the indenture for the same sum in gross, and because R was not named in the writ, it was adjudged that the writ did abate."

Mr. Butler, in his note 141(b) to this passage, after referring to the original case in the Year Book, seems to think it was there held, that if a party to the lease does not put his seal to the deed, he is not a party to the condition in gross comprised in it, though he enters and takes the profits.

In Brookes' Abridgment, title "Dett." pl. 38, the preceding case is thus abstracted: "Where a lease is made to two, and one seals the deed, in which is contained '*ad quas conventiones perimplendas*,' the defendants bind themselves in £20, and one only seals: there by Finchden, if both agree to the lease, he who does not seal shall be charged with the rent; the contrary in respect of the obligatory sum: *nota differentiam*: but however, there the writ was abated for the not naming of the other: *tamen quære legem, caridetur nul ley in le point obligatoire*." *Et vide* Year Book, 45 Edw. III. p. 12, that a party shall be bound by his agreement to all reservations and things necessary to the lease, but as to a matter which binds the person, *come point obligatoire vel hujusmodi*, he shall not be bound without sealing and delivery.

No. XIV.

Code Civil. Livre Deuxieme. Titre Premier.

No. 517. Les biens sont immeubles, ou par leur nature, ou par leur destination, ou par l'objet auquel ils s'appliquent.

518. Les fonds de terre, et les batiments sont immeubles par leur nature.

519. Les moulins à vent, ou à eau, fixés sur piliers et faisant partie du batiment, sont aussi immeubles par leur nature.

520. Les récoltes pendantes par les racines, et les fruits des arbres non encore recueillis, sont pareillement immeubles.

523. Les tuyaux servant à la conduite des eaux dans une maison ou autre heritage, sont immeubles et font partie du fonds auquel ils sont attachés.

524. Les objets que le propriétaire d'un fonds y a placés pour le service l'exploitation de ce fonds, sont immeubles par destination.

525. Le propriétaire est censé avoir attaché à son fonds des effets mobi-

(a) Co. Litt. 231, A.

231, A.

(b) Butler's note, 141, to Co. Litt.

liers à perpétuelle demeure, quand ils y sont scellés en plâtre, ou à ciment, ou à chaux, ou lorsqu'ils ne peuvent être detachés sans être fracturés et détériorés, ou sans briser, ou détériorer la partie du fonds à laquelle ils sont attachés. Les glaces d'un appartement sont censées mises à perpétuelle demeure, lorsque le parquet sur lequel elles sont attachées fait corps avec la boiserie.

Si les objets mobiliers(*a*) ont été placés par un fermier, ou locataire, ils ne sont pas immeubles par destination puisqu'on ne peut supposer à ce fermier, ou à ce locataire, l'intention de les avoir placés à perpétuelle demeure sur un fonds, dont il n'avait que temporairement la jouissance : la forge d'un serrurier(*b*), ou de tout autre forgeron, les cuves et chaudières des brasseurs, des tanneurs, des teinturiers, assises en terre, sont incontestablement immeubles si elles ont été établies par le propriétaire du fonds, mais elles sont meubles si elles ont été placées par un locataire. Quant aux presses(*c*) d'une imprimerie, aux métiers des tisserands, comme ils peuvent être facilement enlevés, ils ne sont immeubles sous aucun rapport, même quand ils ont été places par le propriétaire du fonds : ils sont destinés à l'exercice de la profession, et non au service de la maison.

No. XV.

Code Civil. Titre Quatrieme.

No. 666. Tous fossés entre deux heritages sont presumés mitoyens, s'il n'y a titre ou marque du contraire.

667. Il y a marque de non-mitoyenneté lorsque la levée ou le rejet de la terre se trouve d'un côté seulement du fossé.

668. Le fossé est censé appartenir exclusivement à celui du côté duquel le rejet se trouve.

669. Le fossé mitoyen doit être entretenu à frais communs.

670. Toute haie qui separe des heritages est reputée mitoyenne, à moins qu'ils n'y ait qu'un seul des heritages en etat de clôture, ou s'il n'y a titre ou possession suffisante au contraire.

No. XVI.

Code Civil. Livre Troisieme. Titre Quatrieme.

No. 1376. Celui qui reçoit par erreur ou sciement ce que ne lui est pas dû, s'oblige à le restituer à celui de qui il l'a indûment reçu.

(*a*) Duranton Cours de Droit, t. 4^{me}. No. 46.

(*b*) Duranton, tome 4^{me}. No. 64.

(*c*) Pothier, Traité de la communauté No. 51; qui dit que la question a ete

ainsi jugée pour les presses du celebre, Robert Etienne.

(*a*) See title, "Payment," No. 13, ante; 2 Pothier on Contracts, by Evans, 379.

1377. Lorsqu'une personne qui, par erreur, se croyait débiteur, a acquitté une dette, elle a le droit de répétition contre le créancier : néanmoins, ce droit cesse dans le cas où le créancier a supprimé son titre par suite du paiement, sauf le recours de celui qui a payé contre le véritable débiteur.

1378. S'il y a eu mauvaise foi de la part de celui qui a reçu, il est tenu de restituer, tant le capital que les intérêts ou les fruits, du jour du paiement.

Whether money merely paid from a mistaken notion of legal obligation, unconnected with the existence of any moral duty, is subject to repetition, or can be recovered back, has been often discussed by foreign jurists : according to the rule of the civil law, "In re obscurâ melius est favere repetitioni, quam adventitio lucro."—*Digest*, lib. 50. tit. 17, s. 41. Favetur ei magis qui petit, quam qui de lucro captando certat.

No. XVII.

Code Civil. Livre Troisième. Titre Troisième.

De l'Imputation des Paiements.

No. 1253. Le débiteur de plusieurs dettes a le droit de déclarer lorsqu'il paie, quelle dette il entend acquitter.

1254. Le débiteur d'une dette qui porte intérêt ou produit des arrérages, ne peut point, sans le consentement du créancier, imputer le paiement qu'il fait sur le capital par préférence aux arrérages ou intérêts : le paiement fait sur le capital et intérêts, mais qui n'est point intégral, s'impute d'abord sur les intérêts.

1255. Lorsque le débiteur de diverses dettes a accepté une quittance par laquelle le créancier a imputé ce qu'il a reçu sur l'une de ces dettes spécialement, le débiteur ne peut plus demander l'imputation sur une dette différente, moins qu'il n'y ait eu dol ou surprise de la part du créancier.

1256. Lorsque la quittance ne porte aucune imputation, le paiement doit être imputé sur la dette que le débiteur avait pour lors le plus d'intérêt d'acquitter entre celles qui sont pareillement échues : si non, sur la dette échue, quoique moins onéreuse que celles qui ne le sont point. Si les dettes sont d'une égale nature, l'imputation se fait sur la plus ancienne : toutes choses égales, elle se fait proportionnellement.

No. XVIII.

In Chancery.

JOHN PRENDERGAST, a Minor, under the age of twenty-one years, by CHARLES SMYTH, Esquire, his Guardian, and the said CHARLES SMYTH and JOHN FOLLIOTT, Esquires, *Plaintiffs.*

JOSEPH O'SHAGHNASSY, and WILLIAM O'SHAGHNASSY, ROBERT M'NAMARA, and ISAAC RINGROSE, *Defendants.*

To the Right Honourable the Lords Commissioners for hearing and determining causes in his Majesty's High Court of Chancery in Ireland, humbly complaining, shew unto your lordships your suppliants, John Prendergast, a minor under the age of twenty-one years, by Charles Smyth, Esquire, his guardian, and the said Charles Smyth and John Folliott, Esquires : That the Right Honourable Sir Thomas Prendergast, Baronet, lately deceased, was for many years before his death, and at the time of his death, seised in fee simple, and possessed of the lands of Gortinshegory, in the county of Galway, and of other lands of considerable value in the said county ; and particularly that the said Sir Thomas was for many years before his death, and at the time of his death, in the seisin and actual possession of a mansion-house and demesne, belonging to the said lands of Gortinshegory, situate in the town of Gortinshegory, commonly called Gort, in the county of Galway, which was his only dwelling-house in the said county. Your suppliants further shew, that the said Sir Thomas, being so seised and possessed, duly made and published his last will and testament in writing, pursuant to the Statute in such case made and provided, bearing date on or about the 30th day of July, 1756, whereby, amongst other things, he devised all his real estate to your suppliant, John Prendergast, by the name and addition of his nephew, John Smyth, for his natural life and to the heirs of his body, with several remainders over, on condition that all and every the persons who should take benefit by the same should, immediately on his decease, and their becoming entitled thereto, take and use the surname of Prendergast, and the arms thereto belonging, and no other surname or arms ; and by a subsequent clause in the said will, he the said Sir Thomas vested his said real estate, notwithstanding the devises and limitations aforesaid, in your suppliants, Charles Smyth and John Folliott, and the survivor of them, and the heirs of such survivor, for the purpose only of raising, by sale of a competent part thereof, a certain portion in the said will mentioned. Your suppliants further shew that the said Sir Thomas, by his said will, appointed your suppliants, Charles Smyth and John Folliott, executors thereof, as by the said will, ready to be produced, may appear. Your suppliants further shew, that the said Sir Thomas died without lawful issue, on or about the 23rd day of last September, and that soon after his death, that is to say, on or about the 30th day of last September, by Alexander Franklin, gentleman, their attorney, your

liants entered into the quiet and peaceable possession of the said mansion-house and demesne, and continued in such possession, by virtue of the said of the said Sir Thomas, until the seventh day of this instant October; that the said Sir Thomas Prendergast, during his life-time, and your supplicants since his decease, have been respectively in the actual, quiet, and peaceable possession of the mansion-house and demesne aforesaid, under title in being, and undetermined for three years and upwards, next preceding disturbance hereinafter next mentioned, without any interruption whatsoever: and now so it is, may it please your lordships, that Joseph O'Shaghnessy, and William O'Shaghnessy, the brother of the said Joseph, combining and confederating with Robert M'Namara and Isaac Ringrose, and with divers other persons, to injure and oppress your suppliants, they the said confederates, with upwards of two hundred men in arms, in the night of the seventh day of this instant October, forcibly dispossessed your suppliants' said tenement of the said mansion-house and demesne, and do still forcibly detain possession thereof: all which actings and doings of the said confederates contrary to equity and good conscience: in consideration whereof, and to the end that your suppliants may be restored to and quieted in the possession of the said house and demesne, may it please your lordships to grant to your suppliants His Majesty's most gracious writ of injunction, directed to the sheriff of the said county of Galway, thereby commanding him to restore to your suppliants the possession of the said mansion-house and demesne of the said tenement, aforesaid, and from time to time to quiet your suppliants in such possession. And your suppliants will pray.

GEORGE SMYTH.

PROVER.

[Entered 21st October, 1760.]

NO. XIX.

SMYTH v. O'SHAGHNASSY.

Upon a petition preferred to the Lords Commissioners for the custody of the great seal, grounded on a possessory bill and affidavits, an injunction, dated the 27th of October, 1760, was granted to the sheriff, commanding him to restore the plaintiff, as devisee of the estate in question, to the possession of the mansion-house, of which forcible possession had been taken by the defendant, O'Shaghnessy, who claimed under some old dormant title, and not as tenant at law, and an injunction was granted to the party as to the demesne, as the cause shewn to the contrary within the time prescribed by the order. 9th November, 1760.—Mr. *Solicitor General (Gore)*, for defendant, vs cause (a) against that part of the order which directs an injunction to

(a) Extracted from the Registrar's Book of Motions in Chancery.

the party to issue ; and moves to set aside that part of the order which directs an injunction to the sheriff as to the mansion-house : says there is no instance of this kind, granting an injunction to the party at the suit of the devisee : the heir at law of Sir Thomas Prendergast, the devisor, is not before the Court, and that being the case, this Court will not interfere with the possession between the now contending parties, and aid a devisee before his title is established. A possessory bill is brought to support the possession, and not to determine the right, and a devisee cannot be said to have any possession, or title, until the will is proved, and, in this case, it will appear there was not the least force made use of.

LORD CHANCELLOR (Lord *Bowes*).—Read your order and affidavit.—[Order, 27th October, 1760, read.]

Mr. *Harward*.—Objects to reading the affidavits of Michael Watson, and of the other persons, as they were sworn before the bill was filed.

Mr. *Attorney-General* (*Philip Tisdall*).—The affidavits were read on the original motion : the affidavit of Michael Watson was sworn on the same day the bill was filed, and the objection was overruled on the former motion, and as they now come to shew cause against the order, which was founded on the affidavit, and have given no notice to set aside the affidavit, it ought to be read.

LORD CHANCELLOR.—The affidavit must be read, because it was read on the former motion.

[Affidavits of Michael Watson, Michael Kelly, and Stephen Rice, read.]

Mr. Serjt. *Paterson*, will read the affidavit of Alderman Hans Bailie to the execution of the will : it was read on the former motion.

Mr. *Solicitor General*, for defendant, objects to reading an affidavit of the execution of the will ; and says this matter was determined in the cause between Sir Oliver Crofton, and Sir Marcus Crofton.

LORD CHANCELLOR.—Read it, because it was read on the former motion.—[Affidavit read.]

Mr. *Solicitor* proposes to read affidavits on the part of the defendants, to shew that the force is absolutely denied, and insists that although Mr. Bailie's affidavit has been read, in conformity to the order made by the Lords Commissioners, it cannot be said to prove the title.

Mr. *Attorney-General*.—Objects to reading the defendant's affidavits, for when people come to shew cause, in a case of this kind, they must do it upon some defects in the affidavits upon which the order was founded, but not to contradict them : a semblance of right is sufficient to put the matter in a way of trial ; and he says the matter was determined in the cause of Lord Belvidere *v.* Rochfort.

Mr. *Solicitor*, for defendant.—Affidavits are constantly made use of to set aside injunctions to the Sheriff, and part of this application is to set aside that part of the order directing an injunction to the sheriff as to the mansion house ; and the reason why they are not read on an injunction to the

party is, that the defendant remains in possession until the hearing of the cause.

Mr. *Hutchinson*, for defendant.—The injunction to the party is merely a summons to put the matter in a way of trial, but an injunction to the sheriff is in nature of an execution, which turns the party out of possession without being heard; and any man may be turned out of possession by an affidavit of this kind swearing to a will in another person's favour, though the defendant's title was ever so strong.

Mr. *Harward*, for defendant, quotes the cases of the City of Dublin *v. Vernon*, King *v. Strong*, Lord Limerick *v. Tipping*, and Heatley *v. The City of Dublin*, as authorities for reading the affidavits.

Sir *Simon Bradstreet*, for defendant.—It has often happened in cases of this kind, where the plaintiff has not told the whole truth, that affidavits have been read on the defendant's behalf, and in this case, as they have attempted to prove the will by affidavit, the defendant ought to be suffered to answer it, to shew that perhaps there is another will of a later date.

Mr. *Geo. Smyth*, for the plaintiff.—Apprehends that by the rules of the Court, and by the reasons upon which possessory bills were founded, no affidavit can be read to contradict the force, the right, or the possession: and an injunction to the sheriff does not determine the cause, because if, upon the hearing, the defendant appears to have the right of possession, it will be restored to him, so that the injunction is the original institution of the cause: refers to Lord Burlington *v. Freeman*, and to Webb *v. Dalton and Lowe*.

LORD CHANCELLOR.—These affidavits cannot be read.

Mr. *Solicitor*, for defendant.—It appears upon the face of the plaintiff's affidavits, that this application was made in favour of a devisee who has not proved his title, so that at this day it is a matter of doubt whether there be a will or not: possessory bills are founded upon the equity of the Statute of Henry the Sixth; and the only reason for such bills is, that persons who had a long possession should not be turned out of possession, which is not the case of a devisee, for this Court cannot try a will either of real or personal estate, nor can they set it aside on account of fraud, like a deed, but if of real estate, the question(b) must be tried by a jury. A devisee cannot come into a Court of Equity to desire it to interfere summarily in his favour, except to perpetuate the testimony of witnesses, and in that case only where the devisee is in possession of the whole of the lands, but if out of possession, he must bring his ejectment and try it at law. The plaintiff's title is a recent title, which he can soon prove, and the possession is a recent one, which he should not be quieted in till he proves his title, any more than a remainderman—the title of both being in doubt, until determined by law. The heir at law stands in another light, he having an apparent right, but the devisee, or

(b) Kerrick *v. Bransby*, 7 Bro. P. C. 437.

remainder-man, has not ; and where people come into this court merely on account of force, it has no jurisdiction, it being the business of another court to punish on that account.

Mr. Dennis, for defendant.—The injunction is in the most general terms, for all the plaintiffs are to be restored against all mankind, though the foundation of the order was, that Charles Smyth gave Mr. Franklin a letter of attorney to take the possession for him singly : it is admitted that neither John Prendergast, nor John Folliott, ever had any possession, and therefore it is an absurdity in the order to restore them to the possession ; and as to Charles Smyth he has no interest, but a contingent interest to sell part of the estate for payment of debts, if the personal estate should turn out insufficient, so that he had no interest in the lands now in question, being the demesne, and he must, to entitle him, have a continuing interest for three years ; and as to his title, it took its commencement on the day of the testator's death. The circumstances of this kingdom in the year 1688, gave rise to these possessory bills : title deeds being lost in the confusion of the times, so that people could shew no title but possession. There was not the same occasion for such bills in England, where they are not used, and that necessity ceases in the present case, there being nothing in the plaintiff's way to prevent him from proving his title if he thinks proper.

Mr. Hutchinson, for defendant.—The foundation upon which Courts of Equity have proceeded upon possessory bills, does not come up to the present case, there being no triennial possession, and the Statute of Henry the Sixth never was meant to extend to wills. The Stat.(a) 10 Car. I. c. 13, refers to the proviso in the Act of Henry VI., which relates only to estates of which persons were possessed for three years, which descended from their ancestors, so that it clearly appears the Statute of Hen. VI. only extended to triennial possessions descending from ancestors, and not to devisees, and such possession must be continued without interruption : there never was a determination in England like what is now attempted in favour of a devisee, and it appears from the cases in Mosely's Reports, that these sort of proceedings are not had on account of the necessity of the times. By the common law there are only four methods of continuing estates, by grant, by blood, by representation, and by tenure ; none of which relate to the case of a devisee, so that clearly the same estate does not come to the present plaintiff. A Court of Equity, in the first instance, cannot take cognizance of a will, either of real or personal estate : fraud, in all other cases, is the object of a Court of Equity, and the only reason for coming into equity, in cases of wills, is to remove temporary bars, wherefore the plaintiffs cannot be relieved in this suit. It by no means follows, because an heir at law is to be quieted, that a devisee shall, the heir having peculiar advantages both at law and in equity ; and the title in the present case was disputed in the testator's life-time, for so late

(a) 10 Car. I. Sess. 3, c. 13, Irish.

as the year 1730, an ejectment was brought. As there never has been an instance of a devisee being relieved in a case of this kind, it must be presumed the opinion of the Judges all along was, that it is a matter not relievable in equity. The plaintiff, John Prendergast, never had possession, but it was taken for his father, Charles Smyth, before he was appointed guardian to his son, and as Charles Smyth has only a contingent interest, he cannot be quieted.

Mr. Attorney-General, for the plaintiff.—The testator's title appears to be by grant from William and Mary to the testator's father, so that there was a quiet and uninterrupted possession for sixty years, and he devised the estate to his nephew John Smyth, and made Charles Smyth, who is the father of the devisee, and John Folliott, his trustees, and Charles Smyth, who is guardian by nature to his son until another is appointed, gave a letter of attorney to Mr. Franklin to take the possession, which was accordingly done, and he was turned out by the defendants by force, with many people in arms, and the title of the defendant is in direct opposition to that of Sir Thomas Prendergast, which still continues in the plaintiff, and he ought to be restored. Robuck O'Shaghnessy, the elder brother of the defendant, brought an ejectment in the Common Pleas, and was nonsuited, and the present defendant brought formedons, which he did not think proper to proceed upon, but would avail himself, upon the death of Sir Thomas Prendergast, of a forcible possession against his devisee. The defendant is the person who ought to shew a triennial possession to entitle him to restitution, pursuant to the Statute against forcible entries, and there being no contest between the devisee and the heir, there is no necessity to prove the will, and the devisee may bring actions, and distrain for rent, without proving the will. The affidavits have, therefore, sufficiently proved the will to maintain this possessory bill, for the will and the force must be proved before the cause comes to a hearing. The foundations of possessory bills are two. The first, for the sake of public peace; and the other, to prevent the inconvenience that may happen to persons who lose their title deeds, and must consequently be nonsuited at law; and therefore, by means of these bills, the possession stands in place of a title, and such being the case, it never was more necessary in any case than the present; and if this remedy were allowed only to extend to a man for his own life and to his representatives, it would be of little use, and defeat the intention of the remedy. In this case it does not appear but that the evidence, though matter of record, may be lost, and that, therefore, the plaintiffs ought to avail themselves of the length of possession, without proving more than that they, and those under whom they derive, have had a triennial possession, and especially against a stranger. All the cases which have been quoted have been contests between the devisee and heir at law, both claiming under the person who had the possession, so that there was no question about the possession, and therefore the Court very properly refused to interpose, but here there is no question who is entitled under Sir Thomas Prender-

gast, for the defendant does not pretend any, and on the contrary sets up a dormant title of his own, and, therefore, the right of possession, and that only, is to be put in the way of trial here, and the defendant, if any title he has, must go into a Court of law to establish it, and the rather, for if old proprietors be permitted to take possessions upon their old dormant titles, it may tend to shake our happy constitution. The case of Crofton v. Crofton, which has been cited, is not similar, for there Sir Oliver Crofton did not pretend to a possession, and the question there was between the devisee and heir at law.

21st November, 1760.

Mr. *George Smyth*.—Relief is given in England upon the same equity, under the Statute of Henry the Sixth, for preventing forcible entries and detainers, as is done here, but not in the same summary way; and though *subpoenas* were served upon those bills, yet the injunction(*a*) issues before the coming in of the answer: and when the answer comes in, if there be any colour for an injunction, it is granted until the hearing, and the right is determined there as well as the possession; and if the plaintiff succeeds, a perpetual injunction is decreed. With respect to possessory bills, if they began towards the latter end of the reign of James the First, they are of one hundred years' standing; but he apprehends they began in the reign of Queen Elizabeth. This practice depends partly upon the Statute against forcible entries, and partly upon the civil law; and the Statute directs that restitution to the party grieved should be given forthwith. The plaintiff sues by Charles Smyth, his father and guardian, and Charles Smyth himself being a plaintiff, and having been in the actual possession before the force, they are well entitled to be restored; and the affidavits, which must now be taken as true, prove that Franklin, the plaintiffs' agent, was in possession, and the possession of the servant is the possession of the master, and the possession of the guardian is the possession of the ward. The coming in to set aside the injunction to the sheriff, is an admission of a forcible detainer, and it lies upon the defendant to shew a triennial possession; and by the Statutes against forcible entries, if a person be but a single hour in possession, under a title, either of his own, or of those under whom he derives, he shall be restored until the right be tried. By the practice in this kingdom, the force, and the triennial possession is what they determine, but the least colour of a title is sufficient. If the heirs at law were made parties, they being co-parceners, the matter could not be determined in this summary way; and Lord Coke, in his 3rd Institute(*b*), says: "a devisee is entitled to restitution as against a stranger, though his testator had died but the day before;" and as no right is to be determined upon the hearing of this cause, the heir at law cannot be prejudiced by not being before the Court. The devisee frequently brings a possessory

(*a*) *Filewood v. Palmer*, Mos. 169; (*b*) 3rd Instit. 243.
Ld. Falmouth v. Innys, Mos. 87.

bill against a tenant holding over, and the present case is stronger, where the devisee's own possession is taken by a stranger, who does not dispute the right under the person who had the possession.

Mr. *Fitzgibbon*, for the plaintiff.—Since the making of the Statute, if the *hæres factus* takes the estate by the will of the owner, the descent is broken, and is good against all the rest of mankind, and the title of the devisee, not being disputed by the heir, the devisee stands in place of the heir. The civil law calls the devisee an heir, and the common law calls him *hæres factus*, as no other person but the heir at law can dispute the matter with him. Possessory bills were introduced after the rebellion, for the sake of peace, and the policy of the State, that no person should avail himself of his own wrong. The defendant, or any of his ancestors, have not for sixty years been in possession of those lands, and the testator held the peaceable possession of them for thirty years. It is a common thing for a purchaser, when disturbed, to bring a possessory bill, and to be quieted upon the triennial possession of his vendor. The heir at law being divested by the will there is no necessity for bringing him before the Court.

LORD CHANCELLOR.—Disallow the cause, and let that part of the order granting an injunction to the party be made absolute, and no rule as to the injunction to the sheriff.

No. XX.

22nd May, 1770.

LANE v. FREWEN.

Hearing(*a*) on a Contempt.—The order for the injunction to the party read.

Mr. *Fitzgibbon*, for the plaintiff.—This is a possessory bill brought to be restored to the possession of lands under a title still in being and undetermined. Robert M'Grath being seised(*b*) of the lands, made his will, and devised them to be sold for payment of his debts, and particularly to raise a sum of £1500 to buy a commission for his son Robert, and £1000 a piece for his other two sons, Donogh and Thomas: the first use in the lands was limited to Robert for life, with remainder to testator's other sons successively, and on the 10th of December, 1766, he made a codicil to his will, and thereby, after reciting a deed dated the 9th of December, 1766, which was entered into for the purpose of carrying the trusts of his will into execution, the testator ratified the bequests in his will which were not revoked by his codicil. The testator died in February, 1767, and the plaintiff then entered into possession, and continued possessed until the 28th day of March follow-

(*a*) Extracted from the Registrar's Book of Hearings. (*b*) 2 How. Eq. Exch. 55.

ing, when he made a lease to one Dogherty, who is a co-plaintiff, and who entered and continued in possession until the 19th of July, 1768, when the defendant, Frewen, took forcible possession. The testator, Robert M'Grath, and those deriving under him, were in possession for twenty years before the force.

Mr. *Kelly*, for defendant.—The wife of the defendant, Amos Frewen, was one of the co-heiresses of Robert M'Grath, and Jane Cooke was the other co-heiress, and they took a peaceable possession, which they had a right to do. The testator, Robert M'Grath, was out of his senses at the time of making his will, and therefore the plaintiffs cannot be entitled; and there never was a decree in a possessory cause for a devisee against the heir, as the law *prima facie* casts the possession on the heir: besides, a fine was levied subsequently to the will and codicil, which is a revocation, and the wife of Amos Frewen, who is admitted to be one of the co-heirs, is not a party.

Mr. *Malone*, for defendant.—It appears that Robert M'Grath, the testator, died in February, 1767, without lawful issue, and the defendant, Frewen's wife, and her sister, were his heirs, and that in 1766 he made a will and codicils, and levied a fine, and executed a deed declaring the uses of the fine. There is proof on both sides with respect to the sanity and insanity of the testator, and therefore if this had been an original bill on the right, a trial at law would have been directed, and it is much stronger in favour of the defendants in a possessory bill, and as the plaintiff has not shewn a triennial possession, or a force in this case, the bill should be dismissed. In order to entitle a devisee, he must shew a triennial possession, or that the descent was broken, for the heir has the possession thrown on him upon the testator's death by act of law, and whoever takes it away from the heir must do it in a legal way, and a devisee cannot connect his possession with that of the devisor, until he establishes his right under the will. Wills obtained *in extremis* are usually procured by persons who are about the testator, and therefore the permitting the devisee to continue the possession for a short time ought not to preclude the heir, and there is no act done by the plaintiff but to make a lease to one Dogherty, and the testator's stock still remains on the lands.

Mr. *Solicitor General*, Mr. Serjt. *Dennis*, Mr. *Kelly*, Mr. *Scott*, and Mr. *Mee*, were heard on the same side.

Mr. *Prime Serjeant (Hutchinson)* for the plaintiff.—The will conveys the land to Lane and Grady, in trust for the natural children of Robert M'Grath, and by the codicil it is recited, that the fine was levied to carry the trusts of the will into execution, and refers to the deed of the 9th of December, 1766, declaring the uses of the fine. The trustees immediately took possession, and made a lease to Dogherty, who had the possession, until the defendant, Frewen, turned him out by force. *Crofton v. Crofton*, has nothing to do with this cause, for Sir Oliver Crofton had not the possession for one hour, and in *Smyth against O'Shaghnessy*, it was settled that a devisee has a right to a possessory bill, and to connect his testator's title with his own.

Mr. *Attorney-General* (*Philip Tisdall*) for the plaintiff. — Robert Grath was forty years in possession prior to his decease, and in 1766 he executed a will, a deed, and two codicils, and upon his death the plaintiff, ready, got into possession, and continued possessed until he made a lease to the plaintiff, Dogherty, who held under the lease, until the defendant, Amos Frewen, with an armed force took the possession, and has ever since continued it: the question now is, whether an injunction shall go to put the devisee into possession against an heir at law: the rule is general in proceedings of this nature, that the Court cannot go into the title, as a semblance of title is sufficient to quiet the plaintiff.

25th June, 1770.—LORD CHANCELLOR (*Lord Lifford*).—

The defendants are guilty of the contempt laid to their charge.—Decree an injunction to the sheriff as to the lands, and the defendant, Amos Frewen, to stand committed to the custody of the pursuivant until he pay the costs, and further order.

NO. XXI.

GORMAN v. BROWN.

In Chancery, Easter, 1775.

William Gorman, and Martha, his wife, by indenture(*a*), dated the 13th of December, 1749, conveyed certain lands, being the estate of the wife, to the husband, for his life, with remainder to the plaintiff, who was the eldest son of the marriage, for his life, with remainders over, and levied a fine to the uses of the settlement. In the year 1746, previous to the settlement, William Gorman made a lease to the defendant, Brown, for a term of twenty-one years, under which he held until its expiration; and in February, 1768, William Gorman made a new lease, for his own life, to the defendant, Brown, under which he and the other defendants, who were his undertenants, enjoyed the premises. William Gorman died in 1772, leaving Martha, his widow, and the plaintiff, his eldest son; and immediately after his death, the undertenants took leases of their holdings from one John Bond, who claimed the lands by diverse title, when the plaintiff exhibited his possessory bill.

The cause(*b*) coming on to be heard, as upon a contempt, Mr. Malone stated the plaintiff's case, and insisted that a remainder-man could maintain a possessory bill, by relying on the possession of the tenant for life under the same deed.

The *Attorney General* (*Philip Tisdall*), for defendants.—The posses-

(*a*) How. Chan. Pr. Addenda, 189. Book of Hearings.

(*b*) Extracted from the Registrar's

sion of William Gorman was the possession of his wife, and no person claiming under William Gorman can be restored to the estate belonging to his wife. There is no instance where a remainder-man has maintained a possessory bill, and it is quite different from the case of an heir, devisee, or purchaser: a remainder-man cannot be quieted on the possession of the tenant for life, without going into the title, which cannot be done in a possessory suit, and the plaintiff, if entitled, should be left to bring his ejectment.

Mr. Solicitor-General (Scott), for the plaintiff.—Contends that the plaintiff, as heir at law, is entitled to support a possessory suit against a tenant holding over, and he should not be placed in a worse condition, because he is entitled also in remainder: the defendants, by refusing to give up possession, when their term expired, are guilty of a forcible detainer. All the leases were made under the settlement of 1749, and the deed is produced as evidence of possession, and not as proof of title.

Prime Serjeant *Dennis*, and *Radcliffe*, were heard for the plaintiffs; and *Mr. Provost*, *Crookshank*, and *Hussey*, for the defendants.

1st June, 1775.—The *Lord Chancellor (Lord Lifford)*, observed, this was a favourable case, in point of justice, for the plaintiff, and as unfavourable for the defendants, as could occur. The plaintiff had not only a title under the conveyance of 1749 from his father, but was also his heir at law; and if he had made use of his title as heir only, it was not contended but he might have maintained a possessory bill. On the other side, the defendants did not pretend to have any title, but had endeavoured to betray the possession to a stranger.

The defendants were declared guilty of the contempt laid to their charge, and an injunction to the sheriff was decreed,

No. XXII.

HENRY BINGHAM, *Plaintiff*.

CHARLES PEMBERTON, Heir at Law of JOSEPH PEMBERTON, deceased; HUGH CARBERY, Administrator of JOSEPH PEMBERTON, and EDMOND NUGENT,
Defendants.

February 6th, 1818, hearing before Lord Manners on report, special point, and merits.

As to the special point, let the cause stand over with liberty to the parties to proceed to frame a case for the opinion of the Court of Common Pleas in respect of the matter thereof, and in the meantime take a decree for a foreclosure and sale; the produce of such sale to be deposited in the Bank to the credit of this cause, subject to the further order of the Court, and reserve all further directions.

HENRY BINGHAM v. Heir and Executors of JOSEPH PEMBERTON, deceased.

Case for the opinion of the Right Honourable Lord Norbury, Lord Chief Justice, and his brethren the Justices of His Majesty's Court of Common Pleas in Ireland, pursuant to the decretal order of the 6th of February, 1818, made in this cause.

As of Hilary Term, 1812, James Smith obtained a judgement in His Majesty's Court of King's Bench in Ireland against Joseph Pemberton, for the penal sum of £600, upon the bond of the said Joseph Pemberton, with warrant of attorney for confessing judgement thereon, each bearing date the 7th day of February, 1812, payable to James Smith, his executors, administrators, or assigns, on the day of the death of Joseph Pemberton.

Joseph Pemberton, at the time of the rendition of the judgment, was seised in his demesne as of freehold, of all that and those that part of the lands of Clontarf, containing seven acres, three roods and thirty-three perches, situate in the manor of Clontarf, in the barony of Coolock, and county of Dublin, held by him under a lease thereof from George Vernon, whose estate of inheritance said lands then were, for the term of three lives, at the yearly rent of £38 13s. 6d., payable half-yearly on every 25th day of March and 29th day of September : two of the *cestui que vies* are living. Being so seised, Joseph Pemberton, by indented deeds of lease and release, bearing date respectively the 22nd and 23rd days of June, 1813, and made between him, the said Joseph, of the one part, and Henry Bingham of the other part, granted, sold, assigned, and set over unto the said Henry Bingham, all that and those the said premises, to hold the same, with the appurtenances, to him, the said Henry Bingham, his heirs and assigns, for the residue of the said term of lives, subject to the said reserved yearly rent, and to a condition of redemption upon payment of the sum of £1000, the consideration in said deed of release mentioned, with lawful interest thereon, to the said Henry Bingham, his executors, administrators, or assigns, on the 23rd day of June, 1814, which deed of release was duly registered in the proper office on the 24th day of June, 1813. Notwithstanding said mortgage, Joseph Pemberton remained in possession of the mortgaged premises, and having suffered one whole year's rent to accrue due thereout to and for the 25th day of March, 1816, the said George Vernon, by his feigned lessee, brought his ejectment as of Hilary Term, 1816, under the Statutes in such case made and provided, for recovery of possession of said lands, and to evict said lease, and caused Joseph Pemberton and Henry Bingham to be served with summons in ejectment, and obtained judgement in said ejectment cause, and issued thereon a writ of *habere*, and caused the same to be duly executed on the 3rd day of June, 1816, and thereunder entered into actual possession of the premises. Joseph Pemberton never paid the rent ascertained to be due in said ejectment, or the costs of said ejectment, and after the lapse of six calendar months from the

day of the execution of the *habere*, and before the lapse of nine months, namely on the 8th day of January, 1817, Henry Bingham paid to George Vernon the rent ascertained due in said ejectment, with the full costs, and also the rent which had accrued, and became payable under said lease, from the 25th of March, 1816, to the 29th day of September, 1816, and was put into actual possession of said premises by said George Vernon. The interest which Joseph Pemberton had in the premises is quite insufficient to pay said judgement debt, and the sum due on foot of the mortgage.

The opinion of the Judges of the Court of Common Pleas is desired by the Lord Chancellor, whether the cognizee of said judgment has now any, and if so, what remedy at law, upon said judgement, as against said freehold estate in said lands.

JOHN SMYLY.

THOMAS DICKSON.

5th February, 1819.

Smyly and *Robert Johnston*, for the judgment creditor.—The tenant's right to redeem is saved, when the mortgagee's right is preserved, but this point is not now necessary to be decided, for unless it is inferred that the legislature were wholly ignorant of the principles of the common law, the judgement creditor must succeed. Suppose an *elegit* sued out, and a finding that the debtor was seised of the lands at the time of the rendition of the judgement, the *elegit* creditor must succeed on an ejectment, unless the defendant shew an extinction of the estate on which his lien attached, or that he is barred by Act of Parliament. Consider what are the relative rights of mortgagor and mortgagee: a mortgagee is, in a court of law, an assignee of the mortgagor's estate, and by inference the mortgagee is an assignee clothed with all the legal rights and subject to all the legal liabilities of the mortgagor; Co. Litt. 205, A. A mortgagee may maintain ejectment, or may bring debt or covenant against the tenant in possession under a prior lease, or may distrain; *Moss v. Gallimore*, Doug. 279. Suppose the landlord acquires by ejectment only an equity of redemption until the expiration of nine months, does not payment by the mortgagee within that time leave him assignee *in statu quo* under his original interest, and that legal estate is liable to the legal encumbrances.

The true construction, however, is that after the ejectment the legal estate is in the landlord, but it is an estate on condition defeasible upon the performance of the conditions prescribed by the Act, namely, payment of the rent and costs within the given time; performance of these conditions revests the estate in the person entitled to redeem, just as he had the estate before; if the landlord bring an assize, or distrain for the rent, the forfeiture is waived, but it is otherwise if he only accept a sum of money; *Green's Case*, 1 Leon. 262; *Cro. Eliz.* 3. The estate being saved upon which the judgement attaches, the common law saves the judgement itself, and it would

have been superfluous for the legislature to have done so ; the object of the legislature was to favour the landlord, so far that he should have either his land or his money, but not to defeat leases, or to avoid *bond fide* encumbrances.

If there is an equity of redemption in the landlord, the mortgagee, by filing his bill in equity, has a clear right to foreclose ; or suppose the landlord files his bill to redeem, he must pay the mortgagee, not only his mortgage debt, but must also repay the very rent which was paid to himself by the mortgagee, for the preservation of the interest. There is no weight in the objection, that judgement creditors might at any time come in to redeem, for if the lease be once gone, as it is when nine months expire without payment, the judgement creditor's right is gone for ever : a judgement creditor having no legal estate, is not suffered to defend an ejectment for non-payment of rent, and cannot prevent judgement from going by default.

Lefroy, Serjt., and *Edward Pennefather*, *contrà*.—If the judgement creditor be suffered to interpose his claims, the mortgagee's security will be affected : the mortgagee, by payment of rent and costs, has augmented his demand, and though in equity he would have a right to be reimbursed those expenses (*Ludlow v. Grayall*, 11 Price, 58), yet a court of law not having such a power of marshalling assets, affords an argument to shew that the legislature meant to bar the judgement creditor altogether : if there had been no mortgage, the judgement creditor would have been barred, if the tenant suffered six months to elapse, though the creditor had himself paid the landlord on the following day.

It was said that the acceptance of rent after condition broken, will set up the lease ; *Harvey v. Oswald*, Cro. Eliz. 553–572 ; *Moore*, 456 ; *Pennant's Case*, 3 Rep. 64 ; but it is clear, that a forfeiture can only be waived by acceptance of rent which has subsequently accrued due : acceptance of rent due prior to the forfeiture can have no such effect ; *Green's Case*, 1 Leon. 262 ; Cro. Eliz. 3 ; Co. Litt. 211, B ; *Lessee of Law v. Donnelly*, in the Common Pleas, Easter, 1818. [*Johnson*, Justice.—The case states the mortgagee paid rent up to a time subsequently to the forfeiture accruing.] That comes within the Statute 5 Geo. II., which gives the landlord the continuing remedies after the lease has been evicted. First. How stood the case at common law ? The demand of rent at the day, with all due formality, gave a right of entry ; *Little v. Heaton*, 1 Salk. 259 ; 2 Lord Raym. 750. After entry for condition broken at common law, the landlord was *in* as of his former estate, and all the incidents and encumbrances of the tenant were swept away : courts of law relieved the tenant from some of the hardships imposed by the common law, and Courts of Equity extended the principle, and upon the terms of bringing in the rent, accepting a new lease, and signing a counterpart, they prevented the landlord from insisting on the common law forfeiture, but did not, and could not set up the old lease ; *Downes v. Turner*, 2 Salk. 517. The new lease must have been made to the mortgagee, for if it were made to

the tenant, the mortgage would be gone, and such new lease would, at law, be discharged of the judgement: the judgement as to every species of forfeiture must stand or fall with the tenant. In the case of *Roe demise of West v. Davis*, 7 East, 363, the Court refused to stay proceedings after trial, though formerly they would have done so at any time before *habere* executed: it follows, that the interest was absolutely gone, but courts of law gave relief within a certain time, and Courts of Equity indefinitely.

The Ejectment Statutes had a double object; first, to facilitate the landlord in recovering his rent, and secondly, to abridge the right which the tenant had of applying to Courts of Equity for relief at any indefinite period: in order to facilitate the remedies, these Statutes substitute the service of the summons in ejectment for the observance of the forms required by the common law: the service of the ejectment stands in place of a demand at common law, which *per se* put an end to the lease: the service of the ejectment operating both as a statutable demand, and as entry, nothing remained to the tenant but the equitable right which the subsequent part of the Statute abridged, by limiting the time within which the tenant could obtain relief: and by such service the interests of mortgagees were destroyed, so far as their legal rights were concerned: an express saving of the rights of mortgagees, not in possession, is contained in the Statute 11 Anne, c. 2, but all other persons are expressly barred, and the right of the mortgagee is only to get his money and not to keep the estate: whatever falls within the enacting clause, cannot be defeated by any equitable or virtual construction: the mortgagee, whether served or not, was not bound either by the Statute, 11 Anne, c. 2, or by the 4 Geo. I. c. 5: if the meaning of the saving in the first Act was, that the mortgagee's protection should enure to the benefit of the tenant, the Statute was wholly inoperative: can the limited saving in the subsequent Act have an effect in this respect different from the indefinite saving in the prior Statute? The 8 Geo. I. restricts the rights of mortgagees, and requires them to be served: such service has then the same effect on them, as it had on the lessees in the former Statute, and leaves them nothing but an equity of redemption, that is, the power, through the medium of a Court of Equity, to redeem the premises forfeited, and they shall be barred, if they do not comply with the statutable requisites within nine months, and the landlord shall hold discharged of the mortgage and *equity of redemption*; the Statute does not say of the lease, but only of the mortgage.

The 11 Anne, c. 2, does not limit the time for redeeming mortgagees out of possession; this mischief is remedied by the 8th of George the First, and why not expressly save judgements, if it was intended the rights of judgement-creditors should be preserved; did the legislature mean that though the landlord could bar a mortgagee out of possession, he could not bar a judgement creditor? Judgement creditors are not required to be served with the ejectment, yet if the argument be well founded, a judgement creditor may come in without paying the rent, for there is no right to serve him,

nor to compel him to pay the rent: when the tenant mortgages he has nothing more than the equity of redemption, and the legislature transfers that equity of redemption to the landlord, but saves the mortgagee's right: what is called the judgement creditor's lien, is a right given by Statute to get possession, in progress of time, of his debtor's land, and that right, which is conferred by Statute, may be taken away by Statute. If a judgement-creditor be saved, *a fortiori*, a mortgagee in possession must be saved if a mortgagee out of possession redeems. [*Johnson*, Justice.—In the case put, the second mortgagee must be of the equity of redemption, but suppose a tenant mortgaging by moieties, and one mortgagee in possession, and the other out of possession, what would be the effect?] Or suppose tenant for life mortgaging for years, and afterwards mortgaging his legal reversion.

The mortgagee is at great expense in redeeming, and would it not be unjust to suffer the judgement creditor to take advantage of such redemption, get into possession, and hold the land for payment of his debt, prior to the sum expended, by which the mortgagee preserved the land for him.

The Judges of the Common Pleas certified^(a) their opinion (Lord *Norbury* dissenting) that the conuzee of the judgement had no remedy against the freehold estate, inasmuch as the freehold estate created by the lease to Joseph Pemberton, was avoided and determined by the proceedings in ejectment, and was not set up again by any of the subsequent circumstances stated to have taken place between the lessor and mortgagee.

NO. XXIII.

JACK, on the Demise of LAW, *v.* DONNELLY AND WIFE.

On the argument of a question, reserved at the trial of this cause, for the opinion of the Court, it appeared that a summons in ejectment had been served on the defendants, for recovery of a year's rent due the 1st of May, 1816, when the landlord accepted a consent for judgement, with stay of execution until the 10th of November, next ensuing. A distress was made on the 11th of November for the half-year's rent due the 1st of November immediately preceding. Judgement in the ejectment was afterwards entered, and on the 15th of November the writ of *habere* was executed. By some means, however, the evicted tenant got back into possession, and the present ejectment on the title was brought, laying the demise on the 29th of November, 1816.

Blackburne, for the defendants.—The act of distraining is the prerogative remedy of the landlord, and admits of no qualification: the landlord, at the same time that he affirms the tenure, cannot treat the tenant as a trespasser.

(a) By Fletcher, Moore, and Johnson, Justices.

Ejectment is a remedy for the benefit of the landlord, which he may waive, for if the landlord, after ejectment brought, receives rent, he sets up the case, *Malone v. Malone*, 1 Ball & B. 32.

Jebb, for the plaintiff.—If the judgement had been irregular, the tenant should have applied to the Court; the special matter could not be pleaded in bar of the judgement. After service of an ejectment for non-payment of rent, the Statute treats the occupier as tenant if he redeems, and as a trespasser if he does not. The case of *Malone v. Malone* is inaccurately reported in 1 Ball & B. 32, for in that case the Court did not ground their decision on the judgement being waived by matters *in pais*, but because the amount of the rent had not been ascertained by affidavit.

Edward Pennefather, for the defendant.—The lessor of the plaintiff could not by any means obtain judgement before the 10th of November, until which time the defendant was to occupy by consent: there was at all events a tenancy created in Donnelly, which prevented him from being a trespasser on the day of the demise. The remedy by ejectment is substituted by Statute for the common law forfeiture: in both cases the landlord may waive the benefit of proceedings instituted for his benefit; if he had received rent *quod rent*, he would have waived the forfeiture at common law, and *a fortiori* if he distrain. He contended that the case of *Malone v. Malone* was correctly reported.

April 14th. Lord *Norbury*, Ch. J.—The rent here was paid by the occupying tenant, and not by the defendant, and the receipt given by the landlord for the *November* rent was without prejudice to his ejectment. The lessor of the plaintiff is possessed of an undisturbed judgement, and the acts of the defendant have been rather affirmatory of that judgement: the rent which worked the forfeiture was not the rent distrained for.

Fletcher concurred, and *Johnson*, J., said—If the lessor of the plaintiff was guilty of irregularity in distraining, the proper course for defendant would have been to apply to the Court; the act relied on as a waiver is antecedent to the thing contended to be waived. Suppose an ejectment at common law, for a forfeiture and judgement obtained, could the evicted tenant in a counter-ejectment on the title be allowed to rely on an act which might have afforded a defence in the original suit? Here the judgement in May makes the tenant a trespasser from that period, and for the subsequent period an action for use and occupation would lie. He declined entering into the question, whether, after judgement in ejectment, and the lapse of six months, all proceedings may not be waived by act *in pais*, as it did not arise.

Judgement for the lessor of the plaintiff.

From a note taken by the late Martin B. Rutherford, Esq.

No. XXIV.

Le Code Civil. Livre Troisieme. Titre Huitieme.

No. 1753. Le sous-locataire n'est tenu envers le propriétaire que jusqu'à concurrence du prix de sa sous-location dont il peut être débiteur au moment de la saisie, et sans qu'il puisse opposer des paiements faits par anticipation. Les paiements faits par le sous-locataire, soit en vertu d'une stipulation portée en sou bail, soit en conséquence de l'usage des lieux, ne sont pas réputés faits par anticipation.

No. XXV.

YIELDING, on the Demise of CARRIQUE PONSONBY, v. SIR HENRY
CAVENDISH, BART.

In the King's Bench, Trinity, 1775.

This case came before the Court, on a special verdict found on the trial^(a) of an ejectment for non-payment of rent, by which it appeared, that Colonel Richard Ponsonby being seised in fee of the lands in the declaration mentioned, by indenture dated the 28th of April, 1729, demised the premises to Hugh Swayne, his heirs and assigns, for the term of three lives therein named, yielding and paying during the term to the lessor, his heirs and assigns, the yearly rent of £125 18s. 9d., with a covenant of renewal for ever, on payment of £62 19s. 4½d., within six months after the death of every *cestuique vie* : and the said Hugh Swayne thereby covenanted for himself, his heirs and assigns, with the said Richard Ponsonby, his heirs and assigns, that he the said Hugh Swayne, and his heirs, should, with all their family, within one month after the commencement of this lease, live on the premises during the continuance thereof, and during the continuance of every other lease to be made pursuant thereto, and whenever he or they should fail to do so, that then the rent therein reserved should rise to the sum of £150, and so continue yearly, and every year to the end of this demise, and of every other lease thereafter to be made pursuant to the covenant and intent of the said indenture; and if it should happen that any part of the said rent of £150, on failure of performing the said covenant, should happen to be in arrear at any time after such failure, that then it should be lawful for the lessor, his heirs and assigns, into the said demised premises, or any part thereof, to enter and distrain, and the distress and distresses then and there found, to take, lead, drive, and carry away, and thereof to dispose according to law; and for want of sufficient distress to be had on the premises, to coun-

(a) This judgement is extracted from Henn, one of the Judges of the Court.
the Note Book of the Honorable William

tervail all such rent and arrears as should be so due, that then it should be lawful for the lessor, his heirs and assigns, to re-enter on the said demised premises, and thereof to be again re-possessed and enjoyed, as in his and their former estate; and the said Hugh Swayne did thereby, for himself, his executors and assigns, covenant with the lessor, his heirs and assigns, that he the said Hugh Swayne, his heirs or assigns, should not alien or make over, directly or indirectly, to any person or persons, this present lease, or his or their interest by virtue thereof in the premises, or any part thereof (cottier tenants, for their houses and gardens, only excepted), without the license of the lessor, his heirs or assigns, first had in writing, and under his or their hands and seals, and in default thereof, the said Hugh Swayne covenanted for himself, his executors and assigns, to pay to the lessor, his heirs and assigns, the sum of £20, upon his or their demand.

Hugh Swayne entered, and by indenture dated the 24th of December, 1742, in consideration of £405, demised to Roger Adams part of the said lands, containing two hundred acres, for the same three lives named in the original lease, with a covenant of renewal for ever, at a yearly rent of ten shillings for every acre therein contained: and the said Hugh Swayne, by indenture dated the 8th of April, 1749, in consideration of the sum of £910 5s., demised the residue of the said lands to the said Roger Adams, at the yearly rent of £125 18s. 9d., with a like covenant of renewal for ever. Hugh Swayne and his family resided on the lands until the 1st of May, 1749, when they quitted the premises, and never afterwards returned; and Hugh Swayne, by indenture dated the 13th of June, 1757, for valuable consideration, conveyed his estate in the lands to Sir Henry Cavendish. Richard Ponsonby, being seised of the reversion of the lands in fee, on the 10th of February, 1762, made his will, and thereby devised his estate in the premises to Carrique Ponsonby, the lessor of the plaintiff, and his heirs. Richard Ponsonby died on the 12th of November, 1762, and one of the *cestuique vies* named in the lease of August, 1728, was alive at the time of bringing the ejectment. No other or greater rent than the yearly rent of £125 18s. 9d. was demanded out of the premises, under the lease, until the 5th of August, 1751. The defendant, Sir Henry Cavendish, was always ready and willing to pay the yearly rent of £125 18s. 9d. to the lessor of the plaintiff. Lease, entry, and ouster, and the service of the summons and notice in ejectment, were found by the special verdict, which then concluded, that if, upon the whole, the Court should be of opinion that the covenant for residence in the deed of the 28th of April, 1729, was good and effectual in law, and that the jurors ought, in an action brought for non-payment of rent, take into account the rent claimed to be due to the said Carrique Ponsonby by virtue of the covenant, they then find the defendant guilty; but if the Court should be of opinion that the covenant was not good and effectual in law, or that the jurors ought not, in such action, to take into account the rent claimed to be due by virtue of the covenant, they then find him not guilty.

By this special verdict two questions are made for the judgement of the

Court, but as our determining that which appears to me to be the great and material question, will make our giving any opinion on the other unnecessary, I shall confine myself to that, which strictly is, whether the remedy by ejectment, given by the several Statutes, for non-payment of rent, extends to this rent claimed to be due from the breach of the covenant for residence: or, in other words, whether an ejectment for non-payment of rent will lie for it or not? In determining this question, it will be necessary to consider what rent was the object of those Acts; whether they extended to every species of rent, or had a particular species only in contemplation, and what that species of rent was; and from the best consideration I have been capable of giving those Acts, and the several ingenious arguments of counsel on both sides, I have very little doubt but that all the Acts had one species of rent in contemplation, and that their object was, that species of rent only which is legally and properly termed rent-service, or that rent which is originally reserved by the lessor as the consideration of the demise, and as an equivalent for the land granted, which takes its origin from the commencement of the lease, and is ascertained by it, and to which distress is incident of common right. That this is the true construction appears clear to me, not only from the general tenor of all the Acts, but from particular expressions in many of them: the general language of the Acts is, "in all cases between landlords and tenants, where half a year, or a year's rent shall be in arrear:" these general words cannot, with any degree of propriety, in my apprehension, be applied to any rents but those which are originally reserved by every lease, as an equivalent for the land granted, and are the primary object of every landlord and tenant. This appears more clearly from particular expressions in several of the Acts: in the 5 Geo. II. it is for the rent ascertained by the article, or contract, and in the 11 Anne, and 4 Geo. I. distress is considered as incident to it: which expressions do not, in my apprehension, correspond, nor can they be applied to those penal rents which essentially vary in many particulars from rent-service. In the first place, this penal rent can never be considered as any consideration for the demise, because the demise was complete, and the rent, which was the real consideration of the demise, was ascertained before any agreement for a reservation of this penal rent: the grant, and the reservation of the rent payable for it, were fully completed by the *habendum* and *reddendum*. In the next place, this penal rent cannot be considered as an equivalent for the land, because it was merely eventual and depending on subsequent circumstances, whether it ever should arise, or become payable or not. It did not commence with the lease, and might probably never commence, nor could it be distrained for, but by virtue of a particular contract for that purpose. In truth, those penal rents do not arise from any consideration for the demise, or for the enjoyment of the land, but have their commencement and existence by the particular agreement of the lessee, to be paid to the lessor as a penalty upon the breach of some covenant or condition, and therefore cannot be recovered, but pursuant to the mode prescribed by the parties themselves,

either by distress, or by ejectment on the title at common law founded on the clause of re-entry, or by an action of covenant on the breach : but the recovery of rent by ejectment is a peculiar mode prescribed by those Acts, and is confined, in my apprehension, to the recovery of that rent only, which is the immediate object of every lease, and of every landlord and tenant—that rent which is reserved by the lessor as the consideration for his letting his land to the lessee, and which the lessee agrees to pay as the equivalent for his enjoyment of the land, and to which distress is incident of common right. If this be the true construction of these Acts, there is very little doubt but that an ejectment will not lie for recovery of this penal rent under them ; and, indeed, had the legislature any intention of extending those Acts to the recovery of penal rents, it cannot be conceived but that some mention or some provision would have been made on the subject. All the Acts being totally silent with respect to them, and there being no instance of any recovery of such rents in any ejectment founded on these Acts, seems to be a convincing argument, they never were considered as an object of those Acts, or of the remedies prescribed by them. I am therefore of opinion that the jury ought not to take into account the rent claimed to be due under this covenant, and that judgement ought to be entered for the defendant.

Before this ejectment was brought, a suit was instituted by Roger Adams against Carrique Ponsonby, at the Equity side of the Exchequer, and on the 27th of February, 1766, a perpetual injunction was granted to restrain the defendant Ponsonby from proceeding to recover the additional, or penal rent, reserved by the lease ; but upon appeal to the English House of Lords, this decree was reversed.—Ponsonby *v.* Adams, 2 Brown's Parl. Cases, 431, Feb. 1770.

No. XXVI.

NUGENT, on the Demise of GALWEY, *v.* CUTHBERT and OTHERS.

In the House of Lords, 27th February, 1822.

Lord *Eldon*.—My Lords, there is a cause which was heard a few days ago before your Lordships, on a writ of error from Ireland(*a*). The question in it was, in effect, whether certain leases were executed under circumstances such as to induce your lordships to declare that they cannot stand; that question is presented by the special verdict, by which the following facts were found: That one William Galwey was seised of the lands in the declaration mentioned, in his demesne as of fee, and being so seised, an indenture was executed by him, dated the 24th day of June, 1731, whereby he demised certain parts thereof to Richard Pike, his executors, administrators, and assigns, for the term of eighty-two years, to be computed from the 1st day of May, 1731, at the yearly rent of £56, payable half-yearly. That Richard

(*a*) See *ante*, p. 50.

Pike entered, and William Galwey being seised of the rent and reversion of the lands in the demise contained, and being seised of the residue of the premises in the declaration mentioned, in his demesne as of fee, made his last will and testament, and devised the premises to his son, John Galwey, for life, with remainder to the first son of John Galwey, and the heirs male of the body of such first son, with divers remainders over. The jury further found that the testator, having died seised of the premises, his son, John Galwey, entered by virtue of the will, and was thereof seised for the term of his life, and that Edward Galwey, who was one of the lessors of the plaintiff, was the first son of John, and that, after the death of William, by indenture dated the 14th of November, 1765, the said John Galwey, the tenant for life, demised another part of the premises to the Rev. William Jackson, for the term of thirty-one years, to be computed from the 1st of May, 1765, at the rent of £160 yearly. By indented deeds of lease and release, the release bearing date the 18th of May, 1772, and made between the said John Galwey, of the first part, Edward Galwey, of the second part, the Viscount Clanwilliam, of the third part, James Nash and Richard Reilly, of the fourth part, and James Kearney and Thomas Sarsfield, of the fifth part, they, the said John Galwey and Edward Galwey, released to Kearney and Sarsfield, and their heirs, the respective estates and reversions of them the said John and Edward Galwey respectively, in all and singular the lands and premises, to hold to them and their heirs during the lives of John and Edward Galwey, respectively, in order that they might become perfect tenants of the freehold of the premises, and that a common recovery might be suffered thereof, and that such recovery should enure to the use of John Galwey, for his life, with remainder to the use of Edward Galwey for his life, with remainder to the use of John Galwey the younger, the son of Edward Galwey, for his life, with remainder to the first son of John Galwey, the younger, and the heirs male of the body of such first son, with remainders over. The effect of the recovery was that John Galwey, the father, being tenant for life previous to the recovery, and Edward Galwey being tenant in tail in remainder, expectant upon that estate for life, and the two having the power of disposing of the estate by alienation, exactly as they pleased, they thought proper to reduce the estate of Edward, the son, from a tenancy in tail to a tenancy for life, with remainders over. The question upon this will be, what they intended; what extent of power of alienation they meant to reserve to themselves under the power and authority affecting the estate. The special verdict, with a view to induce the consideration of that question, states: "that it was provided that the demise so made to Jackson should be good and valid according to the terms of the indenture of demise." The demise made to Jackson was a demise, not made by the father and John, but made by the father alone, for thirty-one years; it would have endured certainly for thirty-one years, if John Galwey, the elder, had lived so long, but if he had died in the course of thirty-one years, the term would have been gone, as it could not exist longer than his life-

estate ; but by virtue of a declaration of uses contained in this recovery, it is made a good demise, and it becomes material to observe, that there is to be a term of years antecedent to the estate for the life of John, and of course antecedent to the estate for the life of Edward Galwey.

Then follows this clause : “ Provided always that it shall and may be lawful to and for the said John Galwey, party to these presents, and Edward Galwey jointly,” that is to the two individuals who by suffering a recovery, might have done whatever they thought proper with the estate, to them jointly, not to either of them singly, but to them jointly, “ from time to time during their joint lives, to demise the lands, tenements and premises, or any parts or part thereof :” the power, therefore, under the words which I have just stated, is a power that applies to every part of the premises which were the subject of the settlement : “ to any person or persons for any number of lives or years :” no limitation in point of number of lives, or in the number of years, so that the estate might have been given under the power, without limitation, either as to the number of lives, or the number of years for which the demise was to be made ; and in case that number of lives, or that number of years, was not such as to exhaust the enjoyment of the estate for ever, it is added, that they are to be at liberty jointly to do this, “ with covenants of renewal for ever, so as upon every such lease there be reserved and made payable, during the continuance thereof respectively, the ancient or accustomed rents, or more, and so as none of the said leases be made dispunishable of waste, by any express words therein, and so as in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved, and so as the lessee and lessees to whom such lease or leases shall be made, seal and deliver counterparts thereof.”

There is another leasing power : “ Provided also, that it shall and may be lawful to and for the said John Galwey, during his life-time, and to and for the said Edward Galwey and John Galwey the son, as and when they shall be respectively entitled to the freehold of the said lands, by virtue of any of the aforesaid limitations, by indenture under their respective hands and seals, to demise the said lands, or any part thereof, for one, two, or three lives, or for any term of years not exceeding thirty-one years, so as every such lease be made to commence in possession, and not in reversion, remainder, or expectancy ; and so as upon every such lease there be reserved and made payable, during the continuance thereof, the most and best improved yearly rent that can be reasonably had or obtained for the same, without taking any sum of money, or other thing by way of fine, and so as none of the leases be made dispunishable of waste by any express words, and so as in every such lease there be contained a clause of re-entry for non-payment of rent, and the usual requisite that the party shall deliver counterparts.”

Your lordships will perceive, that the first of these powers is a power reserved to two persons to act jointly, which two persons, previous to the execution of this settlement, had in them jointly the power of making any aliena-

tion whatever of the estate which they thought proper, and there is nothing here said requiring in express terms the lease to be made in possession : it is further to be observed, that with respect to the lease made to Jackson, which is expressly made good by the limitation to uses in the recovery, John and Edward could not, in this sense, be in possession, that they should be in the actual pernanacy of the profits of the soil ; they were entitled to the rent, and, therefore, in a sense, in possession. Then the lease to be made under the second power, was to be made, not for any uncertain number of lives, but for a given number of lives : it was to be a demise, not, as the former was, for any undetermined number of years, but it was to be for a limited number of years, not exceeding thirty-one years, and there was to be no covenant for perpetual renewal.

The special verdict goes on to state, that a recovery was suffered, and that two indented deeds were executed on the 29th of October, 1789, between John Galwey the elder and Edward Galwey, of the one part, and Sir Richard Kellett, of the other part, by one of which, after reciting the indenture of the 14th of November, 1765, made between John Galwey the elder, and the Rev. William Jackson, and then reciting the release of the 18th of May, 1772, the limitations thereof, and the joint leasing power by John and Edward, and that they, by virtue of the leasing power, had agreed to demise the dwelling-house and other premises to Sir Richard Kellett, for three lives renewable for ever at the yearly rent of £160, but subject nevertheless to the lease so made thereof by John Galwey to the said William Jackson, they the said John Galwey and Edward Galwey, in consideration of £1600, paid by Sir Richard Kellett, demised all the premises, with the appurtenances, unto the said Sir Richard Kellett, to hold the said premises during the three lives therein mentioned, and during the lives of such other persons, as should from time to time for ever thereafter be added to, or inserted in, any renewal to be obtained thereof, pursuant to the covenant for perpetual renewal therein contained, yielding and paying the yearly rent of £160, which the special verdict finds is more than the ancient rent of the premises. Then follows this clause : “ That if the reserved yearly rent, or any part thereof, should be behind and unpaid by the space of twenty-one days, next after either of the days so thereby appointed for the payment thereof, that then it shall be lawful for John Galwey and his assigns during his life, and after his decease, for Edward Galwey, his heirs and assigns, or such other persons as from time to time should be entitled to the rent and reversion of the demised premises to enter and distrain ; and for want of sufficient distress, that it should be lawful for John Galwey and his assigns during his life, and after his decease, for Edward Galwey, or such other person as should be entitled to the rent and reversion of the demised premises, to re-enter upon the demised premises, and the same and every part thereof, to have again, repossess, and enjoy, in the first and former estate ;” and then follows a covenant on the part of Sir Richard Kellett, that he would quietly yield and surrender up the premises

on the determination of the term (casualties by fire and war excepted), which is followed by the covenant for renewal.

It may be fairly represented, that as John and Edward Galwey had the whole estate in them at the time this recovery was suffered, though they narrowed their interests in this way, yet that it was their intent and meaning that they who together by virtue of their interest prior to the recovery, could have alienated the whole of the estate, should, by virtue of a joint execution of some power, have, in effect, the authority to make what I may call "an Irish alienation" of the estate, that is to say, that they might alienate it for any number of years, or for any number of lives, with a covenant for perpetual renewal, which being from time to time carried into execution, would effect an alienation in perpetuity.

The objection to the leases is, that a power of re-entry for non-payment of rent, ought to be considered with this degree of strictness, not that the leases are good, if there be any mode of re-possessing the estate of the lessor in case of non-payment of rent, but that there must be, in the strict sense of the words, what is denominated and known by the name of a power of re-entry for non-payment of rent; and it is said, that inasmuch as to part of the premises there was an existing term of eighty-two years, and as to another part of the premises there was an existing term for thirty-one years, and the demise in question is made to commence from the date of the demise itself, that it may be represented, in some sense, as a concurrent interest in the estate—in point of time I mean—and that there being these two terms of years outstanding, there is that intermediate estate between the lessor's estate and the estate which this lessee has, which would prevent the effect of a power of re-entry for non-payment of rent, understood in the strict sense of these words.

Here, my lords, the question is this, whether, looking to the interest of the parties, and looking to the intent of the parties, and looking at the purpose for which this power was inserted in this settlement, you are to say, that notwithstanding the intent with which the power was reserved, still the parties have so mistaken their way in the formation of this settlement, that by no construction whatever can you give effect to these leases. I have always understood that, with respect to powers, you ought, as far as you can, to endeavour to effectuate the intention with which the power is reserved. These persons, before they executed the settlement, had interests in the estate, which gave them jointly a power of alienating the estate for ever: with respect to the premises in question, they thought fit to reserve a power, which does not enlarge what either of them could do by virtue of the interest which they respectively had in the estate prior to the execution of the settlement, but meaning still to continue a power of alienating in another form the estate for ever; that which they were to do by a joint application of their several interests prior to the settlement, they were now to do by virtue of the execution of the joint authority reserved to them by themselves, the grantors in the settlement, to be jointly executed.

My lords, I have looked with great attention into all the doctrine I can find on the execution of powers, and I must confess, after a strong inclination to hold a different opinion, I have brought myself to think, that inasmuch as, by a claim made, they might afterwards bring ejectment in case there was non-payment of rent, and reinstate themselves in the same situation as they were before the execution of this power; that, upon the whole, the judgement from which this writ of error comes is right; and I am the more inclined to alter my opinion upon that subject, because I believe it arose from my mind being a little impressed by the feeling with which an English lawyer looks to this mode of perpetual renewal; by those feelings natural to my mind as being more conversant with the mode of English alienation than of Irish, but attending particularly to that case of *Coventry v. Coventry*, and Mr. Sugden's book, which goes a great way to establish the point I have alluded to, it does appear that this is an execution of the power which goes to effectuate the intention of the parties to the settlement, who had such an interest as these individuals had prior to the execution of this deed, who took notice of that lease, which must therefore have been in their minds, and who evidently intended to reserve to themselves a power of alienation in the form which they here do, or have purposed at least to do, and that it is the duty of a Court of justice to give effect to that intent if it can, and I am, therefore, of opinion your lordships ought to affirm this judgement.

Lord Redesdale.—My lords, this case is so important with respect to property in Ireland, where a great portion of the land is held under leases for lives renewable for ever, that I shall take the liberty of trespassing on your time for a few moments; and first of all I desire to reprobate any idea, that because political inconvenience has been produced in Ireland by leases for lives renewable for ever, therefore your lordships are to have a different disposition in forming your judgement on the construction of leases of that description in Ireland, than you would on the construction of leases of that description in this country. I do not apprehend that such political considerations belong to a court of justice, and I mention it only for the purpose of declaring my opinion, that as long as the legislature shall think fit to permit such leases, the consequence must be that courts of justice must judge upon contracts concerning them, as they would on contracts of any other species.

I think a great deal of the argument in this case has been founded on misapprehension of the state of the property. The special verdict finds that William Galwey made a lease for years; that the lessee became possessed, and that the lessor, being seised of the rent and reversion of the premises, made his will: now William Galwey was seised of the freehold, subject to a legal interest which he had granted out of it, and the rent reserved was not incident to the reversion, but to the freehold, and therefore by his will he devised the immediate freehold, which passed by the will, subject to the lease for years. William Galwey having devised this estate to his son John

for life, with remainder to his first and other sons in tail, the son was tenant for life of that freehold which remained in the father, and the grandson, Edward, was tenant in tail of that freehold, which was one entire estate to which the rent was incident: under these circumstances the father, John Galwey, and his son, came to an agreement; the father had made a lease not warranted under the power which he had, but the son agreed to confirm that lease, and subject to that confirmation, to make a new settlement of the estate, and in making that new settlement a power was reserved to himself and his father jointly, to operate upon the estate in different ways. In giving a construction to the words used in creating the power, I apprehend it must always be considered what was the intent with which the power was given, and for that purpose it must be considered by whom the power was given, to whom, and for what purpose. Now, my lords, the power here is given by John and Edward Galwey jointly; they had the right to give it in any form they thought fit; the power is given to them jointly; the purpose for which it is given is manifest; the power given is to make leases reserving the ancient rent with a covenant for perpetual renewal, that is, a power of alienation necessarily in its nature, because no man will give a lease reserving the ancient rent with a covenant for perpetual renewal, but upon receiving a fine equivalent to the value of the estate which he so grants; it is, in truth, a perpetual alienation, subject to conditions; the power is to demise the said lands, tenements, and premises, or any parts or part thereof: it is therefore a power extending to the whole, extending to that which was subject to the leases for terms of years, as well as to that which was not subject to those leases; and if you were to hold that the power did not extend to those lands, subject to the terms for years, you would hold that the power amounted probably to nothing, because it was utterly improbable that both of them would outlive at least one of those terms which was to last for eighty-two years.

In the case of *Coventry v. Coventry*(*a*), an argument similar to this was made use of to support the leases, and there the leases were far more objectionable than in the present instance, for in that case an objection arose from the possibility of a forfeiture, or the surrender of the term by the preceding tenant, which left an interval between the operation of the leases and the occupation under the succeeding lease, but the best authority in that case thought it was not a sufficient ground to forfeit the lease, because such a forfeiture or such a surrender was not to be presumed; this case does not require that sort of presumption, and is, therefore, more in favour of the leases.

My Lords, as John and Edward Galwey had the power, if they thought fit, to dispose of the whole inheritance, I take it you must hold that construction with respect to the power which they had reserved, which is most bene-

(*a*) *Coventry v. Coventry*, 1 Com. Rep. 312; 2 Sugd. Powers, 378.

ficial for them, because you are not by inference to control the power which the absolute owner of the inheritance had ; you ought rather to hold that the power should be construed most liberally in their favour, and that they had not parted with more than that which they meant to part with ; to set aside these leases you must hold that they could make no freehold demise ; I apprehend they could make a freehold demise ; suppose they had attempted by virtue of this power, to grant a freehold lease, to commence on the expiration of the term of years, I desire to know what authority under the law there is for such a commencement of a freehold estate ? I apprehend there would certainly be none, for in the meantime the power operated on the entire fee, which passed by the settlement ; the effect of such an execution of the power, supposing it could have effect, would be to leave a chattel interest only in the persons to enjoy ; in the meantime, under the lease, the freehold would be gone ; they would have a chattel interest during the remainder of this term and no more.

I conceive the proper way of executing the power under the settlement was that which they have taken, that is, to convey the freehold immediately, by which they made a lease in possession, for the other might have been objected to as a lease *in futuro*, not a lease in possession ; and the power appears to advert to a lease in possession and not in future ; and I think it would have been much more liable to objection if made in that form, than in the form in which it is made. The form in which it is made is according to the terms of the power. There could be no objection to the lease, but by an inference which is attempted to be raised from the words directing that there shall be a clause of re-entry for non-payment of rent ; and by that inference you are to suppose that such a lease, which in every other respect conforms to the words of the power, is not a good lease, because you are by inference to suppose a restraint on the use of the power, which is not expressly averred in the lease, and which is contrary to the very words of the settlement. It is inferred simply and only from those words, “that a clause of re-entry for non-payment of rent should be reserved.” Is not the natural construction of those words, instead of giving them an operation, which, in effect, would defeat the whole words of the settlement,—is not it the natural construction that such a power of re-entry should be reserved as the nature of the case requires ? What is re-entry ? Re-entry is re-possession of the former estate, and here the re-possession of the former estate is capable, under the execution of the power contained in these leases ; that is, the persons who had the former estate would be capable, by virtue of the power of re-entry reserved in this lease, to repossess the estate as they had it before ; the father would be restored to his freehold interest during his life, which freehold interest would have, as incident to it, the rent reserved upon the leases for years, and if he died before the expiration of those leases for years, the son would be in possession as of his former estate of the freehold and of

the rent. There is a power of re-entry reserved in case there should be no sufficient distress, and it is said, there could be no distress upon those lands during the continuance of the lease for years, because during the continuance of the lease for years, the lessee of the freehold would not have the possession of the estate itself; that must be construed in the same way by reference to the nature of the thing to be demised, for you must always, in construing instruments concerning property, consider those instruments with reference to the nature of the property which they concern. It seems to me, therefore, that the objection which has been raised upon this subject is unfounded; that you must construe this settlement as intended to give a power of creating freehold demises for lives renewable for ever upon the whole estate; for otherwise you violate the words of the settlement; you must construe it as giving that power, notwithstanding the clause of re-entry, which is reserved, because consistently with the nature of the estate a clause of re-entry might be reserved, and that is all which is, as I conceive, required by this settlement, even if these persons had stood in a different situation. If this had been a settlement created by a third person, containing such a power as this, I think it would have been far too strict to give the construction which has been contended for; but when it is considered that this is a power given by the persons who were the owners of the inheritance, and who had the power of disposition of the property, and reserved to themselves a power jointly, which was not given to either of them separately, which they did not give to any other person who might claim under the settlement, but confined it to themselves jointly, it is evident they meant it as a power of executing the general power of alienation, which they had before the settlement, and ought to be construed in the most liberal manner.

Another objection has been made upon the words which require that the leases should not be made by any express words dispunishable of waste. Now what is there that does make them dispunishable of waste? There is a covenant to repair which the settlement does not require, and as far as by law the lessees were subject to punishment for waste, independently of the covenant, they would remain as much subject under that covenant as before. It is true no action can be brought against them on the covenant for not repairing any damage by *fire or war*, but it leaves the law still open, and therefore it seems to me that that does not at all tend to impeach the lease under this power.

I agree with the noble lord that these leases have been well executed under the power; that they have been executed in the only form in which a demise for lives could have been made; that it was intended by the framers of the settlement that John and Edward Galwey, during their joint lives, should have the power to make a freehold lease of the whole of the premises under the power; and upon the whole, therefore, I am of opinion that the

judgement of the Irish Exchequer Chamber is right, and ought to be affirmed.

Judgement affirmed.

No. XXVII.

Practical Forms.—Notices to quit.

You are hereby required to quit and deliver up possession of the dwelling-house and premises, [*or*, of the lands and premises], with the appurtenances, you hold of me, situate at _____, in the county of Cork, on the 25th of March next, or at the expiration of the current year of your tenancy.—Dated this 20th day of September, 1844.

(Signed),

A. B.

As the agent of your landlord, Mr. J. S., I require you to quit and deliver up possession of the premises you hold of him, situate at _____, in the county of Cork, on the 25th of March next, or at the expiration of the current year of your tenancy.—Dated this 20th of September, 1844.

(Signed),

HENRY JONES,
Agent for Mr. J. S.

As receiver under the Court of Chancery in the cause of _____, [*or*, matter of _____], I require you to quit and deliver up possession of that part of the lands of Blackacre, [*or*, of the dwelling-house and premises at _____], in the county of Cork, held by you, on the 25th of March next, or at the expiration of the current year of your tenancy.—Dated, &c.

(Signed).

Take notice, that I shall quit and deliver up possession of the premises I hold from you, situate at _____, in the county of Cork, on the 25th day of March next.—Dated, &c.

Distress Warrant.

Distrain the goods and chattels in the dwelling-house and on the premises [*or*, on the lands and premises], of H. B., at Lismote, in the county of Cork, for the sum of sixty pounds, being a year's rent due to me out of them.—Dated, &c.

Particular of Rent.

Take notice, that by authority of Mr. J. S., and as his bailiff, I have this day distrained the premises which you hold from him, at the yearly rent of _____

forty-five pounds, present currency, payable half-yearly, for the sum of forty-five pounds, being two half-yearly gales of said reserved rent, which became due on the 25th of March, 1844, and the 29th of September, 1844, respectively.—Dated, &c.

H. B.

To A. B., and the persons in possession
of the premises.

Inventory of Distress.

Inventory of [cattle, goods, and growing crops], distrained by H. B., as bailiff of Mr. J. S., on the day of , on the lands of Lismote, in the county of Cork, for the sum of £ , due to him for rent of the premises.—Dated this, &c.

[*Annex a list of any furniture, or goods, cattle, or growing crops, distrained*].

Notice of Sale.

To be sold by auction, on the day of , at , the following cattle and goods, distrained for rent due to Mr. J. S. Sale to commence at twelve o'clock.—Dated, &c.

[*Specify the goods*].

Consent to adjourn Sale.

I consent that the distress of my goods by my landlord shall be continued, and that the sale thereof shall be postponed for a fortnight.—Dated, &c.

Request to sell Cattle at a large Market Town.

I request that the cattle distrained on my lands for rent due to my landlord, shall be sold in the city of Cork, and I consent that all necessary expenses attending the removal and sale of the cattle shall be deducted.—Dated, &c.

The bailiff, or broker, employed to distrain, should be furnished with a distress-warrant, and also with a particular of the rent claimed, before commencing the distress : neither of these documents requires a stamp. The particular of the rent should be delivered immediately to every tenant occupying the premises, and if unoccupied, the particular should be posted. The bailiff should then make an inventory of all the property distrained by him, and where goods are impounded on the demised premises, a keeper should be left in possession. Growing crops, when distrained, cannot be sold until ripe and gathered ; and may be redeemed on payment of the rent and charges, at any time before sale. Goods distrained for rent cannot be sold before the fifteenth day after the caption, so that goods seized on the first day of the month, cannot be lawfully sold sooner than the fifteenth. The notice of sale of the distress should be posted on or before the ninth day after the caption,

as six clear days must intervene, unless the distress be continued, and the sale postponed by the tenant's consent.

No. XXVIII.

Proposal for a Lease.

I propose and promise to pay Henry Sackville, for a lease of the dwelling-house and premises in the town of _____, barony of _____, and county of Cork, lately occupied by T. F., with the appurtenances, for the term of twenty-one years, from the 25th of March, last past, the clear yearly rent of £30, payable half-yearly, on every 29th of September and 25th of March, the first half-yearly payment to be made on the 29th of September next: and I agree to keep, and at the end of the term to deliver up the premises, in good repair: and I undertake not to assign or underlet the premises, or any part thereof, without previous leave in writing from the landlord for that purpose: leases to be executed pursuant to this proposal, with the usual covenants, and a clause of re-entry for their non-observance. Dated, &c.

(Signed),

I accept the above proposal.

(Signed).

No. XXIX.

Farming Lease.

This indenture made the third day of May, in the year 1844(*a*), between [lessor] of the one part, and [lessee] of the other part, witnesseth that the said [lessor] doth demise and release unto the said [lessee] all that and those the farm(*b*) and lands of Lismote, containing sixty acres plantation measure, be the same more or less, making ninety-seven acres and thirty perches, or thereabouts, statute measure, in as ample a manner as the same were lately held by H. B. situate in the barony of Duhallow, and county of Cork, with all and singular the rights and appurtenances thereunto belonging, or therewith used or enjoyed: except and always(*c*) reserved out of this demise unto the said [lessor] his heirs and assigns, all timber and other trees, saplings, and all the underwood, thorns, bushes, and quicksets now being, or which shall grow or be upon the premises, and all mines and minerals, turf-bogs and right of turbary, limestone and other stone, sand and gravel, with free liberty to the [lessor] his heirs

(*a*) Any reference to a lease for a year is rendered unnecessary by the Statute, 7 & 8 Vict. c. 76.

(*b*) Parcels.

(*c*) Exceptions.

and assigns, and his and their agents, servants and workmen, at all seasonable times, and with or without horses and carts, to enter into and upon the demised premises, and to fell, carry away, and dispose of the said excepted trees, and to work the said mines and turf-bogs, and to carry away and dispose of the produce thereof, and the said gravel and other excepted things respectively: and also except and reserved all game(*a*) and wildfowl, with the exclusive right and liberty to and for the said [lessor] his heirs and assigns, and his and their servants, friends, and agents, at all seasonable times, to hunt, course, shoot, and sport upon and over the said premises, or otherwise to destroy the game and wildfowl thereon, and the same to carry away and dispose of: to have(*b*) and to hold the premises hereby demised, with the appurtenances, unto the said [lessee] his heirs, executors, administrators, and licensed assigns, from the 25th day of March last, for and during the lives of A. B. and C., and of the survivors and survivor of them, and in case all the said *cestuique vies* shall happen to die within the term of thirty-one years, to be computed from the twenty-fifth day of March last past, then to have and to hold the demised premises for so many years of the said term as shall be to come and unexpired, on the decease of such surviving life: yielding and paying(*c*) yearly and every year during the continuance of this demise, unto the said [lessor], his heirs and assigns, the yearly rent or sum of £100, present currency, by equal half-yearly payments, on every twenty-ninth day of September and twenty-fifth day of March, in every year, the first half-yearly payment to commence and be made on the twenty-ninth day of September, next ensuing the date of these presents: the said yearly rent to be payable, and paid free(*d*) and clear from all manner of existing and future taxes, rates, and deductions whatsoever, by authority of parliament or otherwise, quit-rent and crown-rent only excepted. Provided(*e*) always, that if the said reserved yearly rent, or any part thereof, shall be in arrear and unpaid, it shall be lawful for the said [lessor], his heirs and assigns, into and upon the said demised premises, or any part thereof, to enter and distrain, and the distress then and there found to take, drive, carry away, and thereof dispose according to law, for payment of such rent and costs and charges of distraining.

And the said [lessee] for himself, his heirs, executors, administrators, and licensed assigns, covenants with the said [lessor] his heirs, executors, administrators, and assigns, that he the said lessee, his heirs, executors, administrators, or licensed assigns, will from time to time during the continuance of this demise pay(*f*), or cause to be paid, the said yearly rent of £100, of the present currency hereby reserved, at the times hereby appointed for payment thereof, without any deduction whatsoever, quit rent and Crown rent only excepted: and also that he the said [lessee] his heirs, executors, administrators,

- (*a*) Right of sporting.
- (*b*) Habendum.
- (*c*) Reservation of rent.

- (*d*) Free from taxes.
- (*e*) Clause of distress.
- (*f*) Covenants to pay rent.

and licensed assigns will at his and their own(a) costs well and substantially repair and keep repaired all and every the messuages and tenements hereby demised, and all the out-houses, barns, and other buildings, and all hedges, banks, fences, and mearings, in and upon, or belonging to the demised premises, together with all buildings, improvements, and additions, which at any time during this demise shall be erected, or made upon the premises, and will from time to time, during the continuance of this demise(b), well and effectually mark and preserve the boundaries of the said premises, and prevent all encroachments thereon: and also that the said [lessee] his heirs, executors, administrators, and licensed assigns, will, during this demise, treat and manage(c) all and every the fields and grounds hereby demised, in a proper, careful, and husbandlike manner, and shall not, nor will in any event, take more than [three] successive crops of corn, grain, or pulse, off or from any of the arable lands hereby demised, and shall not, nor will set, sow, or take more than [three] crops of corn, grain, or pulse, from any of the said arable lands (although the same may not be successive crops) without laying down the land, from which such crops shall have been taken, in a husbandlike manner, with sound grass, or clover seeds, and continuing the same so laid down for three years at least, to be reckoned from the time of taking the last of such crops; and also shall not have, or keep in tillage, above one-third part of the arable land hereby demised in any one year, and shall not commit, or do, or suffer to be committed or done on the demised premises, or any part thereof, any wilful or wanton waste, spoil, damage, or destruction whatsoever: and further, that he the said [lessee] his heirs, executors, administrators, and licensed assigns, shall not, nor will(d) assign, set over, mortgage, or otherwise part with the present indenture of lease, or the premises hereby demised, or any part or parcel thereof, or make any underlease thereof, or of any part thereof, unto any person or persons whomsoever, nor permit any part thereof to be used or occupied in con-acre for any crop or crops, without the consent in writing of the said [lessor] his heirs or assigns, first obtained under his or their hands and seals for that purpose: and further, that the said [lessee] his heirs, executors, administrators, and licensed assigns, at the expiration or other determination of this demise, shall(e) and will leave and yield up the quiet and peaceable possession of the premises, and all the crops which shall then be growing thereon unto the [lessor] his heirs and assigns, in good and tenantable order, repair, and condition, and that the said [lessee] his heirs, executors, administrators, or licensed assigns, shall not have(f) any right, title, or lawful claim to emblements, or to any customary or way-going crop, or proportion of a crop, which

(a) To keep in repair.

(b) To preserve boundaries.

(c) Husbandry covenants.

(d) Against alienation without license;

Doe *dem.* Bridgman v. David, 1 Cro. M.

& Rosc. 405; 5 Tyrw. 125, 6 Carr. & P. 614, S. C,

(e) To restore possession.

(f) Excluded from customary crop.

shall then be growing upon the said premises, or any part thereof, or to any allowance or compensation for the same.

Provided always, and these presents are made upon the express condition, that if the reserved rent(*a*) of £100 present currency, or any part thereof shall be in arrear(*b*) or unpaid for twenty-one days after any of the days hereinbefore appointed for payment thereof, although the same shall not be demanded, or if the said [lessee], his heirs, executors, administrators, or licensed assigns shall at any time(*c*), without the consent in writing, under hand and seal, of the said [lessor], his heirs, or assigns, underlet, set, assign, mortgage, or otherwise part with, or suffer to be used or occupied in con-acre, the demised premises or any part thereof, or shall permit(*d*) or suffer any spoil or waste in or upon the demised premises, or if the said [lessee], his executors, administrators, or licensed assigns, or any of them(*e*) shall become bankrupt, or shall take the benefit of any Act for the relief of insolvent debtors, or shall compound with his or their creditors for the payment of his or their debts, or shall make any assignment of his or their personal estate, or any part thereof, for the benefit of his or their creditors, or any writ of execution(*f*) shall be levied upon his or their goods and chattels for any debt or sum of money, or if any order(*g*) shall be made by any Court of Equity for the appointment of a receiver over the premises hereby demised, or any part thereof, at the suit of any creditor, or of any person claiming to be a creditor of the said [lessee], his heirs, executors, administrators, or licensed assigns : or if the said [lessee], his heirs, executors, administrators, or licensed assigns shall neglect(*h*) or fail in the observance or performance of, or be guilty of any breach, non-performance, or non-observance of any of the clauses, covenants, provisoes, or agreements by him or them to be observed and kept, contrary to the true intent and meaning of the same respectively, then and from thenceforth, in any or either of the said cases, this present demise or lease shall wholly cease and be void : and the said [lessor], his heirs, or assigns, shall or lawfully may at any time thereafter enter into and upon the premises hereby demised, or any part thereof, in the name of the whole, and re-possess and enjoy the same, as of his and their former estate, and as if this present demise had not been made, and the said lessee, his heirs, executors, administrators, or licensed assigns, and all other occupiers thereof to expel, put out, and remove from the same, but subject nevertheless, and without prejudice, to any remedies for breach or non-performance of any covenants or agreements hereinbefore contained.

And the said [lessor] for himself, his heirs, and assigns, covenants with the said [lessee], his heirs, executors, and administrators, that he and they,

(*a*) Condition of re-entry.

(*b*) For non-payment of rent.

(*c*) For alienation.

(*d*) For waste.

(*e*) In case of bankruptcy or insol-

vency.

(*f*) Or execution levied.

(*g*) Or order for a receiver.

(*h*) On breach of any covenant.

paying the yearly rent hereby reserved, and observing the several covenants and agreements by him and them to be performed and kept, shall and may (a) lawfully, peaceably, and quietly hold, occupy, and enjoy the lands and premises hereby demised for the said term, without any lawful action, suit, or interruption of or by the said [lessor], his heirs or assigns, or any other person or persons lawfully and rightfully claiming by, from, or under him or them. In witness whereof, the parties hereto have subscribed their names and affixed their seals, the day and year first in these presents written.

(a) Quiet enjoyment.



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THE END.



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